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108
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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, 1907—JANUARY TERM, 1908.

VOLUME LXXX.

HARRY C. LINDSAY,
OFFICIAL REPORTER.

0
PREPARED AND EDITED BY
HENRY P. STODDART,
DEPUTY REPORTER.

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BY HARRY C. LINDSAY, REPORTER OF THE SUPREME COURT,
For the benefit of the State of Nebraska.

MAY 25 1909

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

JUSTICES.

SAMUEL H. SEDGWICK, CHIEF JUSTICE.

JOHN B. BARNES, CHIEF JUSTICE.*

CHARLES B. LETTON, ASSOCIATE JUSTICE.

MANOAH B. REESE, ASSOCIATE JUSTICE.*

COMMISSIONERS.

DEPARTMENT No. 1.

EDWARD R. DUFFIE.

AMBROSE C. EPPERSON.

EDWARD E. GOOD.

DEPARTMENT No. 2.

JACOB FAWCETT.

JOHN H. AMES.

ELISHA C. CALKINS.

OFFICERS.

WILLIAM T. THOMPSONAttorney General

WILLIAM B. ROSE.....Deputy Attorney General

HARRY C. LINDSAY.....Reporter and Clerk

HENRY P. STODDART.....Deputy Reporter

VICTOR SEYMOUR.....Deputy Clerk

*After January 9, 1906.

JUDICIAL DISTRICTS, AND DISTRICT JUDGES OFFICI- ATING AT THE ISSUANCE OF THIS VOLUME.

NUMBER OF DISTRICT	COUNTIES IN DISTRICT	JUDGES IN DISTRICT	RESIDENCE OF JUDGE
First.....	Gage, Jefferson, Johnson, Nemaha, Pawnee and Richardson.	Leander M. Pember- ton..... John B. Raper.....	Beatrice. Pawnee City.
Second.....	Cass and Otoe.....	Harvey D. Travis..	Plattsmouth.
Third.....	Lancaster.....	Albert J. Cornish ... Lincoln Frost Willard E. Stewart...	Lincoln. Lincoln. Lincoln.
Fourth	Burt, Douglas, Sarpy and Washington.	George A. Day..... Lee S. Estelle..... Howard Kennedy.... William A. Redick... Willis G. Sears Abraham L. Sutton.. Alexander C. Troup..	Omaha. Omaha. Omaha. Omaha. Tekamah. South Omaha. Omaha.
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	George F. Corcoran.. Benjamin F. Good...	York. Wahoo.
Sixth	Colfax, Dodge, Merrick, Nance and Platte.	Conrad Hollenbeck.. George H. Thomas...	Fremont. Schuyler.
Seventh	Clay, Fillmore, Nuckolls, Saline and Thayer.	Leslie G. Hurd.....	Harvard.
Eighth.....	Cedar, Cuming, Dakota, Dixon, Stanton and Thurston.	Guy T. Graves.....	Pender.
Ninth	Antelope, Knox, Madison, Pierce and Wayne.	Anson A. Welch.....	Wayne.
Tenth.....	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Harry S. Dungan....	Hastings.
Eleventh....	Blaine, Boone, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	James R. Hanna..... James N. Paul.....	Greeley. St. Paul.
Twelfth.....	Buffalo, Custer, Dawson and Sherman.	Bruno O. Hostetler..	Kearney.
Thirteenth ..	Banner, Cheyenne, Deuel, Keith, Kimball, Lin- coln, Logan, McPherson, Morrill, Perkins and Scott's Bluff.	Hanson M. Grimes...	North Platte.
Fourteenth..	Chase, Dundy, Furnas, Frontier, Gosper, Hayes, Hitchcock and Red Wil- low.	Robert C. Orr.....	McCook.
Fifteenth	Box Butte, Brown, Cherry, Dawes, Holt, Keya Paha, Rock, Sheridan and Sioux.	James J. Harrington William H. Westover	O'Neill. Rushville.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOL. LXXIX.

EDDY, WILLARD

EDMUNDS, J. H.

TRACY, JAMES ALBERT

RULES OF THE SUPREME COURT.

1. **SITTINGS OF THE COURT.**—The regular public sessions of this court will be held on the first and third Mondays of each month at 9 o'clock A. M. standard time, during each term, except at the beginning of the respective terms, when the first day of the session shall be on Tuesday.

2. **SUBMISSION OF CASES.**—A cause shall be regarded as regularly reached for submission at the expiration of the time hereinafter provided for the service and filing of briefs. Any cause may, however, be submitted upon the written stipulation of the parties thereto providing for such submission on printed briefs accompanied by or containing an agreed printed abstract of the record and evidence upon which the case is to be determined.

3. **DEFAULTS.**—Whenever a cause is reached and the brief of the party having the affirmative is not on file, the judgment will be affirmed or the proceeding dismissed, unless otherwise ordered on sufficient showing. When default has been made by the other party and there is due proof of service of process, and the briefs of the party holding the affirmative are on file, with proof of service thereof within the time provided by Rule 9, he may proceed *ex parte*. The hearing of no cause shall be delayed by default of either party in serving or filing briefs. To avoid such result the case will be disposed of as if the delinquent party's brief had not been served and filed; provided that the court may under special circumstances and on suitable terms otherwise order.

4. **ORDER OF HEARING.**—The court, in advance, shall, by order, designate what cases shall be submitted and when, having reference to the order of time in which such cases were originally docketed. Advanced cases and cases in which rehearings shall have been granted will be placed on the call for the sitting of court next following the

expiration of the time for serving briefs as provided by the rules.

5. **ADVANCEMENT OF CASES.**—Criminal cases will stand advanced for hearing without motion. The court will, on motion, which motion shall be submitted without argument, advance for hearing cases which have previously been regularly upon the docket of the court. The court will likewise advance cases within the original concurrent jurisdiction of this court, which have been prosecuted in the district court and brought to this court by appellate proceedings. The court may also in its discretion advance other cases if they involve questions of public interest; but this power will not be exercised, except in cases of grave import and serious urgency, and may also advance cases where it is apparent that if not advanced, the litigation may be fruitless.

6. **TIME FOR ORAL ARGUMENT.**—In the oral argument of a cause, the time allowed the parties on each side shall not exceed thirty minutes, unless for special reasons the court shall extend the time. Oral arguments on a motion will be limited to five minutes on a side.

7. **MOTIONS.**

a. *Notice of.*—Every application for an order in any case shall be in writing, and, except as to motions for a rehearing, shall be granted only upon the filing of such application at least two days before the hearing, together with due proof of service of notice on the adverse party or his attorneys at least three days before the hearing. Motions will be heard only during the first week of each sitting of the court.

b. *Form of.*—The notice herein provided for shall conform to the provisions of section 574 of the code, and shall be accompanied by a copy of the motion, with copies of all affidavits which are to be used upon the hearing. It may be served by a bailiff of this court, or by any sheriff or constable in this state, or by any person; in the latter case, however, the return must be under oath. Fees for service of said notice shall be allowed and taxed as for the service of summons in proper cases.

c. *Mandamus—Notice.*—In all cases of application to this court for a writ of mandamus, a reasonable notice must be given to the respondent of the time when it will be made, accompanied by a copy of the affidavit on which it is based, unless for special reasons it is otherwise ordered.

d. *For Rehearing.*—All motions for rehearing must be printed, and may be filed as of course at any time within forty days from the filing of the opinion or rendition of the judgment of the court in the case. Such motion must specify distinctly the grounds upon which it is based and include the brief in support thereof. Fifteen copies must be filed with the clerk. In original cases, where the error assigned is that the court erred as to the legal principles involved or in its application of the law to the facts, the foregoing provisions shall apply; but as to all other assignments the motion must be made as provided in section 316 of the code, and may be typewritten.

8. **MANDATES.**—No mandate shall issue in any civil case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless specially ordered by the court, or stipulated by the parties.

9. **BRIEFS.**

a. *Time of filing.*—At the time of docketing each civil case the clerk of this court shall estimate the probable date on which the same will be reached for hearing, and thereupon fix and enter on the appearance docket the time, to be known as “Rule Day,” within which the plaintiff, appellant or relator shall serve his brief of points, which shall be separately stated and numbered, together with his citations in support thereof, on the opposite party or his attorney of record, which rule day shall be not less than ninety days before the date of hearing so estimated by the clerk. Within sixty days after rule day, or within sixty days after such service, the opposite party shall serve his brief on the first party, who may reply

thereto within ten days thereafter, at his own expense, except in case of cross-appeal, when costs shall be taxed as usual for the answer brief of cross-appellee.

b. *Criminal cases.*—In criminal cases the fortieth day after the docketing of the case shall be rule day, by which day the plaintiff in error shall serve his brief. The state shall serve its brief in thirty days thereafter.

c. *Advanced cases.*—In advanced cases rule day shall be the thirtieth day after the order of advancement is entered, unless the court shall otherwise order, by which day the appellant shall serve his brief. Appellee shall serve his brief in thirty days thereafter.

d. *When filed.*—Fifteen copies of each brief so prepared by either party, together with proof of service of the same on the opposite party, shall be filed in the clerk's office before the case is submitted.

e. *On Rehearing.*—Within thirty days after a rehearing has been allowed, the party holding the affirmative may serve a printed brief of his points and citations on the opposite party or his attorney of record, by whom in turn a like brief in answer may be served within thirty days after the service of the first required brief, or after the service of a notice that the party holding the affirmative will stand on his original brief, to which answer brief the first party may reply within ten days at his own expense. Fifteen copies of each brief so prepared and served on rehearing, together with proof of service, shall be filed in the clerk's office before the case is submitted.

f. *Leave to File.*—A party in default for want of briefs shall only be permitted to serve and file them out of time by leave of court, upon satisfactory showing of diligence, and at his own costs.

g. *How Printed.*—All briefs shall be printed on good book paper, on pages eight inches wide and eleven inches long, small pica type, leaded lines; the printed matter to be four inches wide and seven inches long, with a margin of two inches on each side and end; but the type in

which extracts are printed may be small pica solid or brevier leaded. The heading of each brief shall show the title of the cause, the county from which the cause was brought, the name of the trial judge, the names of counsel filing the brief, and shall also indicate in whose behalf the brief is filed.

h. *References and Citations.*—Each brief shall by number designate the several pages of the record containing matter bearing upon the questions discussed in such brief. Every reference to an adjudicated case shall be by the title thereof, as well as by the volume and page where it may be found, and the particular edition of any text book referred to must be given in connection with the cited page or section thereof.

i. *Cost of Printing.*—When the parties or their attorneys shall furnish their printed briefs in conformity to the rules of this court, or briefs and printed abstracts under stipulation for submission as provided for in rule 2, it shall be the duty of the clerk to tax a printer's fee at the rate of one dollar for every five hundred words embraced in a single copy of the same against the unsuccessful party not furnishing the same, to be collected and paid to the successful party as other costs. *No costs shall be taxed for printing briefs not printed, served and filed in conformity with the foregoing rules.* When unnecessary costs have been made by either party, the court will, upon application, order the same to be taxed to the party making them, without reference to the disposition of the case.

10. **SECURITY FOR COSTS.**—In each case brought to this court the appellant, or relator, shall, before the entry of the same upon the docket, give security for costs by filing a bond in the sum of \$50, with one or more sureties, conditioned for the payment of the costs of this court, which bond, in cases brought on error or appeal, must be approved by the clerk of this court. The obligation of the surety shall be complete simply by indorsing the summons in error or notice of appeal, or by the execution of a

formal bond for costs, and such surety shall be bound for the payment of all costs which may be adjudged against the appellant, or relator, whether either of them obtain judgment or not, and after final judgment this court on motion of the appellee, or respondent, or any other person having a right to such costs, or any part thereof, after ten days' notice of such motion may enter up judgment in the name of the appellee, or the respondent, or the legal representatives of either, against the surety for costs, his executors, or administrators for the amount of the costs adjudged against the appellant, or the relator, or so much thereof as may remain unpaid, and for accruing costs. Execution may be issued on such judgment as in other cases for the use and benefit of the persons entitled to such costs. But these provisions shall not apply in causes where a bond or undertaking has been filed in the court below in accordance with the provisions of sections 588 and 677 of the code, where such bond is conditioned to pay costs, but in such causes the transcript filed must show the giving of such bond or undertaking, with the names of the sureties thereon. Besides the security for costs above required to be given when a cause is docketed, the party docketing such cause shall deposit with the clerk \$10 to cover clerk's costs that may be made by such party in the cause; and, if the deposit shall at any time be exhausted by the party making the same, the clerk may from time to time require such party to deposit a further sum of \$5. Upon the termination of a cause, any sum remaining from such deposit not applicable to clerk's costs incurred by the party making the deposits shall be returned to him.

11. CAPITAL CASES: SUSPENSION OF SENTENCE.—In all criminal cases brought on error to this court, where it appears that the court below has passed sentence of death upon the plaintiff in error, it shall be the duty of the clerk to enter the constitutional suspension of sentence upon the journal, and he shall immediately transmit to

the officer charged with the execution of the sentence a certified copy of such suspension.

12. QUESTIONS NOT INVOLVED IN LITIGATION.—Only questions involved in matters of actual litigation before the court will be entertained or judicially determined, and no opinion will be filed in answer to any merely hypothetical question.

13. PRECIPE.

a. *On Appeal*.—The party or parties appealing shall file with the transcript a precipe, which shall state the court from which the appeal is taken, the date of the judgment appealed from, the names of all parties and their relations to the case as they appeared in the court below. The precipe shall also specify the party or parties appealing, and designate all others made parties to the appeal as appellees.

b. *On Cross-Appeal*.—Coparties of appellants may join in the appeal or take cross-appeal, or any appellee may take cross-appeal, by filing with the clerk of this court within thirty days before the time fixed as rule day a precipe, which shall designate the name of such party as cross-appellant, and the names of all adverse parties as cross-appellees.

14. NOTICE OF APPEAL.—Upon the filing of said transcript and precipe, where no notice of appeal has been filed in the district court within ninety days after the rendition of the judgment or decree, the clerk shall issue a notice of appeal, which shall designate as appellants the names of the parties joining in the appeal, and as appellees the names of all other parties. It shall also designate the court from which the appeal is taken, the date of the judgment appealed from, and separately state the names of the parties plaintiff and the parties defendant, respectively, in the district court. The notice shall be returnable within thirty days after it is issued, and shall be served upon the appellees named therein, or their attorney or attorneys of record in the district court. The service shall be made by the sheriff of the county in which the

parties or attorneys may be found, and as provided by law for the service of summons in civil actions in the district court. The issuing and service of the notice may be waived by writing, signed by the parties to be served; but neither such waiver nor the filing of notice of appeal in the district court will dispense with the filing of the precipe.

15. ATTORNEYS OF RECORD BELOW ATTORNEYS IN THIS COURT.—The attorneys of record and guardians *ad litem* of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties, respectively, in this court, until others are retained or appointed and notice thereof served on the adverse party.

ADMISSION OF ATTORNEYS.

1. ADMISSION OF ATTORNEYS: TIME OF EXAMINATION.—Examinations of applicants for admission to the bar will be held on the second Tuesday of June and the third Tuesday of November each year; provided, however, that the commission may hold examinations at such other times and at such places as the commission, or a majority thereof, shall deem advisable; applications of candidates for such examinations being on file with the clerk of this court as provided in rule 2.

2. APPLICATION AND SHOWING: CERTIFICATE OF SPONSORS.—Each applicant for admission shall at least four weeks before the day set for examinations file with the clerk of this court a written request, in his own handwriting, and subscribed by himself, for admission, together with his personal affidavit as to his age, residence, and time and place of study, or admission, and period of practice in courts of record in another state or a territory, and the certificate or affidavit of at least two citizens of good standing in the community where the applicant resides, or formerly resided, that they are well acquainted with him and that he is of good reputation in that community and that they believe him to be of good moral character.

3. ADMISSION ON EXAMINATION: SHOWING BY APPLICANT AND PRECEPTOR: EDUCATIONAL QUALIFICATIONS: REPUTABLE LAW SCHOOL.—Each applicant for admission upon examination shall, in addition to making the showing set out in rule 2, make proof by his own affidavit, and by the affidavit or certificate of his preceptor or preceptors, that he has regularly and attentively studied law under his or their personal direction or supervision in a reputable law school, or in the office of a practicing attorney, or partly in such school and partly in such office, for a period of at least three years, at least one year of which office study shall have been passed in a law office in this state; provided, also, that each applicant shall prove either by school, college or teacher's certificate or diploma, or in examination before the bar commission, that he has had preliminary education, other than legal, equivalent to that involved in the completion of the first three years of a high school course accredited by the state department of public instruction. A reputable law school, within the meaning of the act for admission to the bar, is one having a three years' course of study of not less than thirty-four weeks a year, and actually requiring for admission to regular class standing a preliminary education equivalent to a Nebraska high school course of three years, and requiring of each regular class recitation averaging at least ten hours a week. If it be shown by the affidavit of the applicant that his preceptor is dead, or that for other satisfactory reasons his certificate cannot be obtained, there may be substituted therefor the certificate of any member in good standing of the bar of the county in which the applicant pursued his studies, and who may be personally cognizant of the facts.

4. OTHER PROOF OF CHARACTER AND QUALIFICATIONS OF APPLICANT.—None of the facts required for qualifying an applicant for admission shall be conclusively established by the foregoing proof, but the applicant shall in his application give the names and addresses of at least three persons, other than those whose certificates he presents,

of whom inquiry can be made in regard to the applicant's character and other qualifications.

5. **PAYMENT AND DISBURSEMENT OF FEES.**—The applicant shall also, with his application, deposit with the clerk the sum of \$5. The clerk shall enter all sums so received in a book or account kept for that purpose, showing date and name of applicant, and shall pay the same out on order of the chief justice in payment of the expenses of such examination, and for no other purpose; that is to say, the cost of necessary printing and stationery; to the clerk for each oath and certificate of admission issued to an applicant, one dollar and fifty cents; to each member of the commission conducting the examination, his necessary traveling expenses, and for personal expenses while actually engaged in the performance of his duties, not exceeding \$5 a day. The secretary shall receive a salary of \$50 per annum.

6. **ADMISSION FROM ANOTHER STATE OR TERRITORY.**—Any practicing attorney in the courts of record of another state or a territory having professional business in either the supreme or district courts of this state may, on motion to such court, be admitted for the purpose of transacting such business, upon taking the required oath. Any such attorney having become a resident of this state, desiring to be admitted to practice generally in the courts of this state, must make his application as required by these rules, and present proof by satisfactory certificate that he is a licensed practitioner in a court of record of another state or a territory where the requirements for admission when he was admitted were equal to those now prescribed in this state, or that he has practiced law five full years under license in any state or territory within ten years next preceding the date of his application.

7. **REGISTRATION AT COMMENCEMENT OF STUDY: FORM: FAILURE TO REGISTER: CHANGE OF PRECEPTOR: FEE.**—The clerk of this court shall keep a register in which every person applying for admission upon examination as hav-

ing studied in the office of a practicing attorney in this state must have registered at the beginning of his term of study, unless good cause, other than ignorance of this rule, satisfactory to the commission, be shown to the contrary. Such register shall disclose the name of the student, his residence, and the name and address of the attorney in whose office he is studying. The application for registration shall be in writing, and may be formal or informal. In case of change of preceptor or removal from one office to another, such change must be notified to the clerk, who will note it on the register. The clerk may require a fee of fifty cents from every applicant registered.

8. COMMISSION: APPOINTMENT: DUTIES.—The court will, on or before the opening of the September term in each year, appoint a commission composed of five (5) persons, learned in law, to conduct examinations for the ensuing year. The commission so appointed shall, prior to the examinations, examine the proofs of qualifications filed in accordance with the foregoing rules, and may make such further investigations as to the qualifications of any applicant as it shall deem expedient. On the day appointed, it shall commence the examination of applicants. The method of conducting the examinations shall be left to the discretion of the commission, it being expected that the commission will, in the conduct of such examinations, and in the investigation of the qualifications of applicants, take care that no person shall be recommended for admission who has not in all particulars shown himself to be well qualified.

9. REPORT.—As soon as practicable after the conclusion of the examination the commission shall make a written report to the court of its conclusion, and all persons who shall be recommended for admission by a majority of the commissioners shall thereupon be admitted to practice on taking the oath prescribed by law.

10. REJECTION OF APPLICANT: FURTHER CERTIFICATE.—If an applicant shall be rejected, he shall not again be

admitted to an examination for one year from the time of such rejection, and until he shall file a certificate that he has studied law for one year since his rejection.

11. GRADUATES OF THE COLLEGE OF LAW.—Graduates of the College of Law of the University of Nebraska and Creighton College of Law shall make application and present proofs of qualifications in the same manner as other applicants. If found otherwise qualified by the commission, they shall be admitted without examination.

In Memoriam.

JOEL W. DEWEESE.

At the session of the supreme court of the state of Nebraska, November 6, 1907, there being present Honorable SAMUEL H. SEDGWICK, chief justice, Honorable JOHN B. BARNES and Honorable CHARLES B. LETTON, associate justices, the following proceedings were had:

MAY IT PLEASE YOUR HONORS:

Your committee appointed to prepare and present at this time resolutions which shall express our love, respect and esteem for our deceased brother, Mr. JOEL W. DEWEESE, respectfully beg leave to submit the following:

Resolved, That by the death of JOEL W. DEWEESE the state has lost a loyal, patriotic, high-minded, Christian citizen, the profession of the law an honest, earnest, conscientious and learned brother, his family a loving, tender and indulgent husband and father.

Resolved, That in his daily walk and conversation he was always guided by a high and delicate sense of honor, a noble rectitude of purpose, and a kindly consideration for the feelings of others. He had great generosity for human weakness. He was always kind, generous and forgiving, a nature free from malice, a soul with no taint of resentment. His plain, simple, sweet, gentle nature was his distinct characteristic, and made him a marked man.

Resolved, That, while MR. DEWEESE was quiet and unobtrusive in manner, modest and unassuming in his demeanor, yet he was a man of indomitable courage, great earnestness of purpose, strong moral fiber, and unswerving in his convictions of duty. His life was such as to point a splendid example of noble, unselfish high-mindedness, and should serve as an inspiration to those who survive him.

Resolved, That we tender to his family and relatives our deepest sympathy and sorrow over this their greatest affliction.

Resolved, That these resolutions be spread upon the records of this court as a lasting tribute to his character and worth, and copies thereof be furnished to the widow and children of the deceased.

C. J. GREENE.

N. K. GRIGGS.

F. M. HALL.

W. J. MORLAN.

F. M. HALL:

Again the business of the court is suspended, and we pause for a few brief moments at the bier of our departed brother to lay a flower upon his grave that now holds all that is mortal of him, while his spirit has winged its flight to the great Father who gave it.

Again we are reminded how futile are all things earthly—pomp and pride, success, position, riches—all is vanity. In the presence of death how paltry, weak and insignificant do all these things seem. They are powerless to comfort, console or assuage our sorrow. We realize at such times what phantoms we have been pursuing and wherein we have failed to lay hold of the great verities of life, the things that endure and make for righteousness. At such times as this the words of the Psalmist force themselves upon us with special emphasis: "What is man that thou art mindful of him, and the son of man that thou visitest him; for thou hast made him a little lower than the angels and hast crowned him with glory and honor."

The real consolation from the death of a man like Mr. DEWEESSE comes not from his intellectual greatness, not from his great achievements, not from his great ability and learning as a lawyer, not from the manner in which he wrung verdicts from the juries and decrees and judgments from courts; what do all these amount to now?—but rather from the thought that he was a man of strong but simple faith in God. This point was his guide and inspiration.

He was an honest, earnest, consistent Christian man. His life was built upon this broad and solid foundation; his conduct, acts and deeds were shaped and controlled by this unseen, but, no less to him, real and positive power. It was this that gave color to his thoughts and controlled his conduct in all his relations in life. It gave to him a quiet and easy dignity and pose, a serenity and self-possession that few men enjoy. It was his simple faith in God that put into his character the gentle girth of true nobility.

We need more such men. The times in which we live are robust; they are marked by strenuousness and force. Weakness is considered ignoble and indolence a crime. All men are beginning to feel that they must build up a good stock of vigorous, tenacious fiber into their characters or under the pressure of the times go to the wall. It is considered that we must get a tonic into our blood either by exercise or a stimulant, and that we must each possess a brain capable of mastering facts with an almost lightning rapidity. Oftentimes men stop here, and

consider themselves thoroughly equipped for life because they have a strong, well-trained intellect. This is a fatal mistake. The affections, the conscience, the heart, must be as strong and quick and resolute as the body, and the mind as vigorous and keen, or the character of a man will be smitten into ruins by the first storm that assails it.

MR. DEWEESE had been schooled in the Christian religion, not so much of the church or of the letter, but of the man. The God man it is that furnishes the stuff which the character for the times needs to be made of; the changeless word of the changeless God I believe to be the greatest formative force in human character. When we have told all we know about the glory of the intellect and the marvels it has accomplished, after all, the heart is the throbbing center of the man. "Call the roll of the deeds that have made this world ring with applause, and you will find that it is the heart behind them that put into those deeds the quality that is immortal. Who is the true patriot? The man who with colossal brain coldly calculates how he may make the varied resources of his country enrich his private coffers? No; it is he who with quick sympathy labors for the solidarity, the all-round good of his country, and whose heart beats to the music of the battle drums and the flutter of the flag of human liberty." "Surely these times need men and women with fixed purposes in life, unmoved by the outer greatness of this visible world and unbridled by its social pomp, glitter and false glory, and who, believing in God, in the Book, and in a fast hastening eternity, and in some distinct truths that reach out into the future life's illimitable joy, and who are able now and here to point to some great facts and truths made real in their daily lives that make full proof of that eternity in which they so confidently believe."

J. W. DEWEESE was born September 10, 1843, in Morgan county, Illinois. His parents moved to Iowa one year later. He lived on a farm during his minority, and when 19 years of age enlisted in company G of the Twenty-Third Iowa infantry, and went into rendezvous at Des Moines, Iowa, in September, 1862, marching with his regiment to the then terminus of the Chicago, Burlington & Quincy Railway at Ottumwa, Iowa. His commanding officer for a time, as well as his intimate friend, was Captain J. A. T. Hull, now a member of congress from the Des Moines district, and now chairman of the committee on military affairs. He was mustered in as a private, and mustered out as a sergeant in 1865. MR. DEWEESE served three years with his regi-

ment, and with it participated in the battle of Milliken's Bend, famous for the butchery of the negro troops by the confederates. He served with the army of the Tennessee and of the Cumberland, and was with General Grant's army through the siege of Vicksburg and at its capture.

At the close of the war he at once entered college at the Central University, located at Pella, Iowa, and remained in school until 1867, when he entered what was then the Iowa law school conducted by Judges Wright and Cole of the Iowa supreme court. This Iowa law school, by its consolidation with the state university of Iowa in 1868, became a part of the state university, making Mr. DEWESE an alumnus of the state university. He was admitted to practice by the supreme court of Iowa in July, 1868, and at once entered into the practice at Pella, Iowa, with Thomas Ryan, under the firm name of RYAN & DEWESE. About a year afterwards he removed to Prairie City, Iowa, and in 1870 he began the practice alone, and remained there until his removal to Lincoln in 1879.

He married Rebecca Ryan in November, 1869, and leaves surviving him four children—two boys and two girls. He was not blessed with overabundance of this world's goods in his earlier years, and had no influential or wealthy friends to help him, but was almost wholly dependent upon his own efforts to obtain an education, and, aside from what little he had saved while in the army, had to make his own way while attending college and law school. This he did by working on a farm during vacation or in teaching singing schools in that part of Iowa. By dint of hard work and strict economy he fitted himself for his position at the bar. He was always a close student, stood well in his classes; and was always most popular with his teachers and fellow students.

In 1876, and again in 1878, he was elected to the Iowa legislature. Here as elsewhere he was a close student, a hard worker, and noted for being clear-headed, fair-minded and conscientious in his career; always painstaking in his work and fair to all interests. It was while so serving that he made the acquaintance of the late "Tom Potter," then general manager of the Chicago, Burlington & Quincy Railway system, and it was Mr. Potter who urged him to go to a large place and one more suited to his abilities. It was Mr. Potter who directed him to Mr. Marquette, and gave him a highly complimentary and commendatory letter of introduction to Mr. Marquette. He came to Lincoln in the spring of 1879, and the law firm of MARQUETTE, DEWESE

& HALL was organized about a year later, and continued until the death of Mr. Marquette in December, 1894.

MR. DEWEESE was a man of cheerful disposition, optimistic and hopeful in his make-up, simple in his tastes, genial and companionable in the home, the office, and in all his relations with men, always quiet, gentle and dignified in the courtroom, considerate and respectful to the court and opposing counsel, always upholding the honor and dignity of his beloved profession. His candor and simple honesty in presenting his cause never failed to impress both court and jury. He was clear and fair in his statement of his case, rather than forceful. His whole conduct and demeanor in trying a cause always impressed the jury with his sense of fairness and justice. He always prepared his cases with great care, and never knowingly attempted to deceive or mislead the court; the real man showed forth in every move that he made.

MR. DEWEESE was the most even tempered man I ever knew. It was my privilege to be associated with him as a partner in the practice of the law for more than 15 years, and I do not know that I can pay him a greater tribute than to say that during all those years I never saw him out of patience, not even petulant or irritated; never heard him use a cross word to any one, not even to the clerks in the office. He was uniformly kind, gentle and considerate to every one. He was so well-poised that he was never unduly elated over success or unnecessarily cast down by defeat. I shall remember him as a quiet, even-tempered, well-balanced, high-minded Christian gentleman of high character and strong moral fiber, whose fair name was never tarnished by an ignoble act. He was modest and unassuming, lacking somewhat in what we might call aggressiveness, but, upon the whole, he was a well-balanced man of sound judgment and sane views of life, not easily swerved from the course that duty marked out.

The special corporate interest that he so ably represented for many years withdrew him very largely from public view. He was never given to mixing much in public affairs or to the discussion of public questions. He had none of the qualities of an advocate or an orator. His strength as a lawyer lay along different lines and in other directions. During the latter years of his life he had almost entirely withdrawn from the general practice of the law, and was devoting all of his strength and energy to the special interest that he represented. Therefore but little was seen or known of him by the general public.

I had noted during the last year of his life that he seemed to

be constantly losing ground. At each time that I would meet him in our daily intercourse from week to week and month to month he seemed to be in worse condition than when I saw him before, but at each time that I inquired as to the condition of his health I was always met with the same reply, given in the same cheerful, hopeful, genial way, with no tinge or taint of discouragement or loss of hope. This hopeful disposition stayed with him to the end.

He has gone, but he left behind him for our instruction the lesson of his beautiful life of sympathy and service. His sun went down in the evening of a well-spent life to rise again in the radiant light of a new morn.

N. K. GRIGGS:

My first meeting with MR. DEWEESE was in a court room, in the southern part of this state, shortly after he had entered the service of the Burlington. An incident, transpiring then, has remained fixed in my memory, largely because of the insight it gave me of his tact, a trait which my closer acquaintance with him led me to observe the more. He was acting as counsel for his company, defending, of course, in a case where he had against him an exceedingly aggressive opponent, who for present purpose, may be called the "Captain." During the trial MR. DEWEESE made some objection which sent his antagonist into a vehement tirade, lasting nearly half an hour, the main point in which was that railroad companies were always interposing objections for the purpose of thwarting justice, a contention, by the way, somewhat new then. When the Captain had finished, all looked to MR. DEWEESE, expecting an address from him in reply. In lieu of this, however, he simply looked up and said: *Why, Captain, you know that the one lone privilege remaining to railroad companies, these days, is the right to object; that is all that is left, all. And you surely do not want to take this last one away, do you?* It was not so much what he said, but how he said it, that was so telling, for his manner was more than half sad, his voice even appealing. The result was an instantaneous outburst of merriment on the part of all present, the Captain himself joining in the laughter. The objection of MR. DEWEESE was, of course, permitted to stand, but that was in the long, long ago.

In part, because of our common employment, and, in part, by reason of our common affiliation with the same religious body, the relations between us were long of the most intimate and confidential char-

acter. Knowing him thus well, I had the amplest possible opportunity of taking fair measurement of him, alike in his professional career and private life. The one great point in his character was his exceeding kindness. Never, as I believe, did he lose his temper or become ruffled, even though he had reason to believe that injustice was being done either to him or to his cause; nor ever did he stoop to be anything less than a perfect gentleman. His language was always chaste, proper to homely fireside and circle of culture. As a lawyer, he was sturdy in his assertions of his client's rights, yet exceedingly deferential to his opponent and his opponent's views. And, while resourceful in the court room, his success was more largely due to his kindly tact than to any other cause. So high his honor, that his most bitter adversary would cheerfully accord to him the tribute of never resorting to aught but honorable means to achieve victory.

Of all those holding positions of eminence in this state, it is probable that he was the least widely known. He came and went, in the discharge of his grave duties, so quietly and unobtrusively that his comings and goings went almost unnoted. Fame he did not seek, notoriety he even carefully avoided. Of his personal acquirements, let it suffice to say that he had traveled widely, read much, and had pronounced convictions upon every great question inviting the attention of the most thoughtful. It was, indeed, a rare privilege to be one of the favored few permitted to know, or to fathom, his views upon themes the most profound. Well do I recall the regret he once expressed to me that the question of the resurrection of Jesus, to his mind the most momentous of all questions, was not oftener discussed from the pulpit. All who knew him intimately could not but feel that he was of an exceptionally religious temperament, with views of the life to come as fixed as they were optimistic. And no one, in all Lincoln, was more faithful in the discharge of Christian duty than was he. Indeed, just as he sought his office upon the week day, faithfully and quietly, and even to the very last, for the discharge of his secular duties, so, in like manner, did he go to the church of his choice upon the Lord's day to worship, then remaining to teach his class in the Sunday school.

But, to me, the chief charm in his character was his gentleness and manliness. He had a smile and kindly word for all. He spoke well of others, never ill. He did not conceive for worthy act unworthy motive. No child but would gladly go to him, and even the street cur

xxvi IN MEMORIAM—JOEL W. DEWEESE.

knew instinctively not to fear him. Of no other within my knowledge could the lines be more appropriately applied than to him:

All honor to the one,
Whose daily duty done,
Has blessing for the many,
And a grief for none.

And yet, with all his kindness and simplicity, he was, in the very best sense, a brave man, ready to face, without complaint, any trial placed in his way. Only a few days before he went to his duty beyond I visited with him, and, though knowing then that the end for him was doubtless near at hand, he spoke as cheerfully and patiently as though across his path no gloom was falling. Surely in him was proof of the fact that the gentlest are ever the bravest.

There stands in a church in Strassburg a wonderful work of art in honor of Marshal Saxe. There the marble is made to portray that dauntless one of war as stepping, unawed, into the open tomb, while hands of France are striving in vain to stay his going. And yet, not more befitting that beautiful creation to stand in honor of that soldier, than would it be to grace our own Wyuka as tribute to Brother DEWEESE. For no less fearless was he, in answer to duty's call, than was the great soldier, and even more willingly here would hands of love outreach to stay our brother's going, than would all of those of France to stay the step of that intrepid marshal.

SEDGWICK, C. J.

Speaking for the court, it is proper to say that Mr. DEWEESE had the full confidence of the courts before whom he appeared.

In presenting his causes he wasted no time with trivial details, nor with immaterial matters. He went direct to the vital point in his case, and presented it with clearness and ability. He always had the manner of a man who believed he had a just cause, and sought no unfair advantage. No one could doubt his sincerity. He was therefore interesting, and commanded the careful attention of his hearers.

The committee has suitably expressed the high regard in which he was held by the members of his profession throughout the state. I think his character and attainments were as highly esteemed by all courts in which he was accustomed to appear.

It is entirely appropriate that the report of the committee, and these proceedings, be spread upon the records of the court, and it is so ordered.

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CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
AT
SEPTEMBER TERM, 1907.

STATE, EX REL. JOHN L. SUNDEAN, RELATOR, V. GEORGE C.
JUNKIN, SECRETARY OF STATE, RESPONDENT.

FILED NOVEMBER 9, 1907. No. 15,336.

Elections: CANDIDATES: BALLOTS. If an individual has filed the application required by section 5 of the primary election law (laws 1907, ch. 52), and has duly qualified himself to be the candidate of a political party, and the requisite number of members of another party file a petition complying with section 45 of that act, asking that the name of the same person be also placed upon the ballot of their party, it is the duty of the officer making up the ballot to place the name of the person so designated upon the ballots of both political parties.

ORIGINAL application for a writ of mandamus to compel respondent to place the name of relator on the primary election ballot. *Writ allowed.*

George L. Loomis and A. S. Tibbets, for relator.

W. T. Thompson, Attorney General, W. B. Rose and Grant G. Martin, contra.

SEDGWICK, C. J.

The relator filed an application in this court for a writ of mandamus against the respondent to require him, as secretary of state, to place the name of the relator on the ballot at the primary election held on September 3, 1907,

as a candidate of the people's independent party for the office of regent of the university, and also to place the relator's name as a candidate for the same office upon the democratic primary ballot. The writ was allowed for the reasons hereinafter stated. The relator is a qualified voter, resident of the city of Wahoo, in Saunders county, in this state, and on the 20th of July, 1907, he filed with the respondent, as secretary of state, a written application to have his name placed upon the primary ballot as candidate of the people's independent party for the said office. This application was filed pursuant to section 5 of the primary election law (Comp. St. 1907, ch. 26, sec. 117f), and contained the necessary representations to entitle him to have his name placed upon the ballot as requested in his application. Afterwards, on the same day, a petition was filed, signed by 25 qualified electors of the democratic party, asking the respondent to place the name of the relator upon the primary ballot to be voted by the democratic electors of the state for the same office. This petition was filed pursuant to section 45 of the primary election law (Comp. St. 1907, ch. 26, sec. 118s), and contained the statement that the relator was a candidate, for the same office, of the people's independent party. The section referred to contains the following language: "When the name of the candidate appears on a petition presented by a political party or members thereof with the required number of signers and it is expressly stated in said petition that the candidate is a candidate of two or more parties, each of which shall be entitled to nominate a candidate, then it shall be the duty of the officer making up the ballot to place the name of such candidate or candidates upon the ballot in the same manner as now provided for in the general election law for ballots at the general election." With this petition the relator filed his affidavit as follows: "State of Nebraska, Lancaster County, ss.: John L. Sundean, being first duly sworn, deposes and says that he affiliates with the parties named in the within certificate, to wit, the people's independent

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party and the democratic party, and that he will abide by the results of the primary election to be held on September 3, 1907, in the state of Nebraska, and if elected will qualify and serve as regent of the university of Nebraska. John L. Sundean. Subscribed in my presence and sworn to before me this 20th day of July, 1907. (Seal.) A. S. Tibbets, Notary Public."

The respondent refused to place the name of the relator upon the ballots of both parties, and the question so presented was whether the same person, being otherwise qualified and having complied with the statute, is entitled to become the candidate for nomination of more than one political party at a primary election. The language above quoted from the primary election law is perhaps not entirely clear in its phraseology. There are other expressions in the statute not constructed with the view of harmonizing the form of expression used with the provision quoted. We think, however, that the purpose of the legislature in introducing into the act the language which we have quoted cannot be mistaken nor misunderstood. Unless the effect of this language is to allow more than one political party to have the same candidate for an office, it can have no purpose or meaning. The act provides: "This statute shall be liberally construed so that the real will of the electors may not be defeated by an informality or failure to comply with all provisions of law in respect to either the giving of any notice or the conducting of the primary or certifying the results thereof." Comp. St. 1907, ch. 26, sec. 117a. If a petition with the required number of signers is presented by the members of a political party, asking that the name of an individual shall be placed upon the ballot of that party as a candidate for nomination, and also stating that the person so designated is a candidate of two or more parties, naming the parties, and each of the parties so named is entitled to nominate a candidate, "then it shall be the duty of the officer making up the ballot to place the name of such candidate or candidates upon the ballot." Comp. St., ch. 26, sec. 118s, *supra*.

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Unless we consider that this means that the name is to be placed upon the ballot of each of the parties of which he is alleged to be a candidate, the necessary steps having been taken to make him a candidate of such parties respectively, we can give the language used no meaning and the whole provision becomes nugatory. If, therefore, he has qualified himself to be the candidate of a party by the application provided for in the statute, and the members of another party to the requisite number petition to have the name of the same candidate placed upon the ballot of the petitioners, specifying in the petition the fact, as the statute requires, that he is also the candidate of another party, then his name must be placed upon the ballots of both such parties as a candidate.

It was the duty of the respondent to place the name of relator upon the ballot of the people's independent party, and also upon the ballot of the democratic party, as a candidate for the office of regent of the university, and the writ was therefore allowed.

WRIT ALLOWED.

STATE, EX REL. CHARLES T. DICKINSON ET AL., RELATORS,
V. GEORGE L. SHELDON, GOVERNOR, ET AL., RESPOND-
ENTS.

FILED NOVEMBER 9, 1907. No. 15,450.

Elections: NOMINEES. The same person may be the candidate of more than one political party for nomination at a primary election, but he cannot be the nominee of any party unless he receives the requisite number of votes cast by that party.

ORIGINAL application for a writ of mandamus to compel respondents to canvass and certify the votes cast for relators as candidates for judge of the district court. *Writ denied.*

Charles T. Dickinson and John O. Yeiser, pro se.

W. T. Thompson, Attorney General, W. B. Rose and Grant G. Martin, contra.

SEDGWICK, C. J.

These relators, Charles T. Dickinson and John O. Yeiser, were candidates for nomination on the republican ticket to the office of judge of the district court of the Fourth judicial district at the primary election held on the 3d day of September, 1907. They each filed with the secretary of state an application in writing, asking that their names, respectively, be placed on the official primary ballots as candidates of the republican party for the said office. Thereafter petitions were filed with the secretary of state signed by the required number of electors affiliating with the democratic party, the petitions reciting that the relators were candidates of the republican party, as aforesaid, and requesting that the names of the relators be placed on the official primary ballot of the democratic party as candidates for the said office. Accordingly the names of these relators were placed upon both the republican and democratic official ballots as candidates for nomination to the said office, and were voted for both by republicans and democrats. Each of two other candidates upon the republican ballot received more republican votes than either of these relators, but, if the votes received by each of the relators upon both ballots be counted together, then each of the relators received more votes upon both ballots than either of the two candidates referred to received upon the republican ballots. The other two candidates referred to received no democratic votes, and so these relators claim that all of the votes received by each of them upon both ballots should be counted together for the person so receiving them, and that they are entitled to certificates of nomination upon the republican ballot. This is an application to this court for a peremptory writ of mandamus requiring the respondents, members of the state canvassing board, to canvass and certify the votes as contended by the relators. The attorney general demurred to the petition for the writ, which was sustained and the writ denied, and it is

thought that the matter is of sufficient importance to require a brief statement of the reasons for this action of the court.

The relators cited and greatly relied upon *State v. Yankee*, 129 Wis. 662. The court in that opinion, after quoting from their statute, used this language: "This provision certainly means what it says; and so the words, 'the greatest number of votes at a primary,' necessarily include the votes for persons whose names are not printed on any ballot, but are written in on the primary ballot of his party, as well as those that are written in and also printed on the ballot of some other party." The relators understand this language to mean that a candidate whose name is printed upon the ballot of one party can be voted for by writing his name into the ballots of another party, and that such votes are to be added to and counted with his votes upon the ballot upon which his name is printed pursuant to nomination papers filed by him; that is, if a candidate files nomination papers as a candidate of one political party, and his name is printed upon the ballot of that party, and he does not file nomination papers as a candidate of any other party, but his name is written in upon the ballot of some other party, then the votes which he receives by writing his name in the ballot of the other party are to be added to the votes which he receives as the candidate of the party upon whose ballot his name is printed and for which he has filed nomination papers, and that the total of these votes is to be counted in his favor as the candidate for the party upon whose ballot his name is printed. We do not so understand the language used by the Wisconsin court. Indeed, if this was the meaning of the court, the proposition would be *dictum* merely, because this point was not before the court in that case. The point determined in that case was that the voters could write into their party ballot the names of the persons for whom they desired to vote, and such votes should be counted for the persons whose names were so written in, although the names of such persons were not

printed upon the ballot. The name of the relator, Pray, was not printed upon either ballot as candidate for district attorney, but was written into 26 ballots of the democratic party regularly cast, and, as no person whose name was printed on the ballot of that party as a candidate and who had filed nomination papers received 26 votes of that party, it was held that the relator, Pray, having received the highest number of democratic ballots cast, was entitled to be the nominee upon the ballot at the election as the democratic candidate for the office of district attorney. The other relator, who was a candidate for the office of county treasurer, was similarly situated and was declared to be the nominee of the democratic party for that office. Neither of these candidates was a candidate for the republican nomination and neither received any votes of that party, and therefore in that case the question which is presented here was not raised or considered. The language quoted from the opinion is not very precise, but the manifest meaning is that votes should be counted where the name of the candidate was written in on the ballot, although that name is not printed on the ballot, as well as in cases where the name is both printed and written upon the ballot. In either case the person nominated as "the candidate of a party" must receive the highest number of votes for that office cast by the voters of that party.

The point here presented is not left in doubt by the provisions of our statute. "The person receiving the greatest number of votes at a primary as the candidate of a party for an office shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot at the following election." Comp. St. 1907, ch. 26, sec. 117z. He must receive the greatest number of votes "*as the candidate of a party*," and then he becomes the "candidate of *that party* for such office." He may be the candidate of different parties at the primary election. He may receive some votes as the candidate of one party and some votes as the candidate

of another party. If he receives the requisite number of votes of one party as its candidate for nomination, he becomes the nominee of that party. This may result in making him the nominee of more than one party, and, if so, his name goes upon the ballot at the election as the nominee of both parties. The primary elections of the different parties might be held on different days. There are practically as many primary elections held as there are political parties represented at the primaries. Although the same person may be the candidate of more than one party, he cannot be the nominee of any party unless he receives the requisite number of votes of that party. Our primary law provides for what is called the "closed primary." It is supposed that the members of each political party will participate in nominating the candidates of that party, and the voters of one party are not allowed to nominate the candidates for another party. Each voter must declare his party affiliations, and thereupon he receives a ballot of that party, and may vote for whomsoever he pleases as a candidate of the party. If the name of the candidate for whom he desires to vote is not printed upon the ballot, and such candidate has not filed any nomination papers, he may still, under the Wisconsin decision cited, vote for such candidate by writing his name upon the ballot which he casts. It is not necessary now to determine whether this would be a proper construction of our statute. There were seven judges to be chosen at the general election in the Fourth judicial district, and only seven candidates could be nominated by the republican party. There were seven candidates of that party who each received more republican votes at the primary election than were received by either of the relators. Their application, therefore, to have their names placed upon the official ballot at the general election as republican nominees was properly denied.

WRIT DENIED.

HENRY STEELE V. STATE OF NEBRASKA.

FILED NOVEMBER 9, 1907. No. 15,242.

1. **Burglary: STOREHOUSE.** A vat six or eight feet deep and six feet in diameter, constructed of heavy oak timbers, which is partly sunk in the ground, having a hinged cover secured in place by a lock, and which is used for storing hides, awaiting sale, is a "storehouse," within the meaning of that word, as used in section 48 of the criminal code.
2. **Trial: WITNESSES: CREDIBILITY: QUESTIONS FOR JURY.** The fact that a witness testifies to matters on his cross-examination which are somewhat inconsistent with his direct evidence does not warrant the court in rejecting his testimony altogether, for it is the province of the jury to determine the matter of the credibility of the witnesses, and the weight which should be given to their evidence.

ERROR to the district court for Otoe county: PAUL JESSEN, JUDGE. *Affirmed.*

D. W. Livingston and *A. P. Moran*, for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin*, *contra.*

BARNES, J.

Henry Steele, who was the defendant in the district court, was convicted of the crime of burglary, and brings the case here for review. He was charged in the information with breaking and entering a certain storehouse and stealing therefrom four certain hides, of the value of \$20. It appears from the evidence that the hides in question were stored, awaiting sale, in a structure or repository originally constructed for a beer vat; that it was built of heavy oak timbers, was six or eight feet deep by six feet in diameter, was partly sunk in the ground, and had a hinged cover which was secured in place by a lock. This receptacle had been continuously used for storing hides

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for about eight years, and was being used for that purpose when the burglary in question took place. It also appears that the lock above mentioned was broken, and four of the hides contained in the structure were stolen therefrom.

It is strenuously contended that this repository was not a storehouse, within the meaning of the section of the criminal code upon which the prosecution was based. It is said that it is not a house, and therefore cannot be a storehouse. We find, however, that the word "storehouse" is defined by the adjudicated cases to be a house in which things are stored; a building for the storing of grains, foodstuffs, or goods of any kind; a magazine; a repository; a warehouse. *State v. Sandy*, 25 N. Car. 570; *Ray v. Commonwealth*, 75 Ky. 397; *Johnson v. State*, 19 Ala. 527. In *Benton v. Commonwealth*, 91 Va. 782, 21 S. E. 495, it was said that the word storehouse includes a meathouse where meat is stored and kept. The term storehouse, as used in our statute, necessarily means some kind of a structural barrier to the ingress of the public. A repository or receptacle where goods are stored is a storehouse. Such a structure need not be a house or a building, strictly speaking. It is enough if it is shown to be a structure properly barred from entrance by the public, where goods are stored and kept. In Bishop, Statutory Crimes (3d ed.), sec. 293, it is said: "In popular language, and by the better opinion in legal, this word (warehouse) signifies an apartment or building for the temporary deposit of goods. Therefore, a cellar wherein they are kept to be removed when wanted for sale, * * * is a warehouse." It is said in 1 Wharton, Criminal Law, sec. 794c, that the word storehouse is a wider and more comprehensive term than warehouse. And in *Metz v. State*, 46 Neb. 547, we held that a corncrib is a storehouse. The defendant in this case, in order to obtain the hides which were stolen, was obliged to break the lock, or, in other words, break and enter the vat, and such breaking and entering of the structure in question constitutes burglary, within the meaning of the section of the criminal code defining that crime.

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Defendant's second contention is that the district court erred in refusing to instruct the jury that the receptacle which contained the hides alleged to have been stolen "is not a storehouse, within the meaning of the statute defining and describing burglary." What we have said in disposing of the first assignment obviates the necessity of any discussion of this question, and it is sufficient to say that the instruction was properly refused.

Finally, it is urged that the court erred in not excluding the evidence of the witness E. G. Mueller as to the matter of the identification of the stolen hides. It is said that, although the witness positively identified them in his direct examination, yet on his cross-examination he admitted that he had not seen the cattle killed. While such an admission may have had a tendency to discredit the evidence of the witness, yet the court could not for that reason reject his evidence; and its probative force was properly left for the determination of the jury. The same may be said of the evidence of the witness Wells, of which a like complaint is made.

As we read the record, the defendant was given a fair and impartial trial, and the judgment of the district court is therefore

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SEVERAL PARCELS OF
LAND ET AL., APPELLANTS.

FILED NOVEMBER 9, 1907. No. 14,747.

1. **Cities: ORDINANCES: VALIDITY.** An ordinance of the city of Plattsmouth recited that it was passed under and by virtue of an act which was afterwards declared unconstitutional. Irrespective of the power granted by the unconstitutional law, the city council had the power under the previous statute to enact the ordinance. *Held*, That the mistake in reciting the power to act did not operate to deprive the city council of the power which it actually had under the existing law.
2. **Taxation: TAX SUIT: PLEADING.** In an action under the scavenger

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law for the collection of delinquent city taxes, the presumption is that the tax was legally levied and assessed, and the burden is upon the defendant to plead and prove affirmatively facts showing the lack of authority upon the part of the city authorities to levy the tax.

3. **Cities: INCORPORATION: ANNEXATION OF TERRITORY: COLLATERAL ATTACK.** Where the existence of a municipal corporation is not questioned by the state, it cannot be brought in issue by a private individual in a collateral proceeding, nor can the validity of annexation proceedings be tested in such a suit, where the evidence shows acquiescence in the proceedings and the payment of taxes levied by the corporation for several years.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Former judgment of reversal vacated and judgment of district court affirmed.*

A. L. Tidd, W. C. Ramsey and Matthew Gering, for appellants.

O. A. Rawls and H. D. Travis, contra.

LETTON, J.

The facts are stated in the first opinion by Mr. Commissioner ALBERT, 78 Neb. 703. In that opinion it is said: "The amendatory act of 1885, under which the city attempted to extend its limits by ordinance so as to include defendant's land, conferred no authority to annex adjacent territory by ordinance, and, as there was no valid law then in force conferring such authority, the attempted annexation was unauthorized," and the conclusion is largely based upon this premise. On rehearing our attention has been called to the fact that at the time the annexation ordinance was passed the act of March 2, 1881 (laws 1881, ch. 23), was in force, providing for the annexation of property contiguous to the corporate limits of cities such as Plattsmouth. This act provides in substance that, whenever the owner or owners and inhabitants, or a majority thereof in numbers or value, of any territory lying contiguous to the corporate limits of any city or village, whether the

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territory be subdivided or remains unsubdivided, desire to annex the territory to any city, they shall cause an accurate plat to be filed in the office of the city clerk, with a written request for the annexation. The city council at the next regular meeting shall vote upon the question of annexation, and if a majority vote for annexation an ordinance shall be prepared and passed declaring the annexation, and a certified map and copy of the ordinance shall be filed and recorded in the office of the county clerk or recorder of the county. Thereupon the annexation shall be deemed complete. The power to act, therefore, was granted to the city authorities and existed at the time of the passage of the ordinance of annexation. The ordinance recited that it was passed by virtue of an act passed in 1885, which act was void. *City of Plattsmouth v. Murphy*, 74 Neb. 749. But the mistake in reciting the power to act did not operate to deprive the city council of the power which it actually possessed under the existing law. *Delumater v. City of Chicago*, 158 Ill. 575. The recital was unnecessary and may be disregarded as surplusage.

Upon whom is the burden of proof in this case? The petition is made by the statute (Ann. St., sec. 10651), *prima facie* evidence that all the statutory requirements with reference to the levy and assessment of the taxes have been complied with, and the burden is placed upon the person seeking to escape from the payment of the taxes levied to show wherein they are not properly chargeable. The defendant relies upon the invalidity of proceedings taken to include his property within the limits of the municipal corporation to escape the payment of city taxes. If the action were *quo warranto*, brought by the attorney general on behalf of the state to inquire into the validity of the incorporation, the burden of proof would be upon the respondents. *State v. Davis*, 64 Neb. 499. But this case is not of that nature. In an injunction suit to prevent the collection of a tax, or in a proceeding such as this looking to the same result, the presumptions are

all in favor of the authority, validity and regularity of the action of the city authorities, and their lack of the same must be affirmatively shown. The passage of the ordinance of annexation is presumptive proof of the existence of the statutory prerequisites. *Tierney v. Cornell*, 3 Neb. 267. It is incumbent on the defendant, therefore, to plead and prove the lack of authority to act on the part of the officers of the city. The general rule is that parties will not be permitted to attack collaterally the incorporation of a city or village, or the manner in which adjoining property has been annexed thereto. This principle has been followed and applied by this court in the following cases: *South Platte Land Co. v. Buffalo County*, 15 Neb. 605; *McClay v. City of Lincoln*, 32 Neb. 412; *County of Lancaster v. Rush*, 35 Neb. 120; *State v. Dimond*, 44 Neb. 154; *Sage v. City of Plattsmouth*, 48 Neb. 558. It is pointed out in the latter case that some importance was attached in the decisions in the former cases to the length of time during which the owners of land had acquiesced in the proceedings, but this did not affect the general principle that the proper method in which to question the validity of the incorporation was by a direct proceeding in *quo warranto*. Some expressions in the case of *Chicago, B. & Q. R. Co. v. City of Nebraska City*, 53 Neb. 453, seem to be in conflict with the rule announced by all the preceding cases in this court, and none of them is mentioned in that opinion. In that opinion it is said: "Where the statute points out the mode of procedure for the extension of the boundaries of a city, the same must be substantially followed, else it will be of no validity," and it is said in the opinion, in substance, that one of the facts necessary to jurisdiction had not been affirmatively shown to exist.

An interesting question is presented as to whether these cases are directly in conflict, and, if so, as to which announces the better doctrine. A somewhat extended examination of the cases cited in the briefs of counsel, and of a number of other cases, shows that the holdings of the American courts are not entirely in harmony as to the

wisdom and propriety of allowing collateral attack to be made upon the validity of the acts of municipal corporations in annexing territory. The cases seem to fall into several classes: First, a few hold as the *Nebraska City* case does, that in the absence of any one of the jurisdictional prerequisites the act of the city council in annexing territory is void, and that it can be attacked collaterally by an injunction proceeding, and at the suit of a private citizen. *Forsythe v. City of Hammond*, 142 Ind. 505, 30 L. R. A. 576; *City of Indianapolis v. McAvoy*, 86 Ind. 587. In another class, the cases go entirely upon the doctrine of laches and *de facto* incorporation, the idea being that, where a corporation is actually exercising corporate powers over certain territory, either by the levy and collection of taxes or other methods, and the persons living thereon have acquiesced therein for a long period of time—in the reported cases, varying from four to thirteen years—a private individual, by reason of his acquiescence and laches, will not be permitted to attack the incorporation collaterally and contend that the incorporation is not valid. Of these cases are *Kuhn v. City of Port Townsend*, 12 Wash. 605; *State v. Henderson*, 145 Mo. 329; *School District v. State*, 29 Kan. 57; *State v. City of Pierre*, 15 S. Dak. 559; *Coe v. Gregory*, 53 Mich. 19; *McCain v. City of Des Moines*, 128 Ia. 331; *Mendenhall v. Burton*, 42 Kan. 570. Another class, of which an example is *State v. Leatherman*, 38 Ark. 81, go further, and hold that, even where the incorporating body possessed no jurisdiction and the order was void, still laches and delay will render an attack upon the same ineffective, even by proceedings in the nature of *quo warranto*, and that “the state herself may, by long acquiescence, and by the continued recognition through her own officers * * * be precluded from an information to deprive it of franchises long exercised in accordance with the general law.” See, also, *State v. Des Moines*, 96 Ia. 521, and authorities cited. In still another class, the element of time appears to be thought immaterial, it being considered that the public

may be deceived by a *de facto* organization, as well the day after its completion as a long time thereafter. *Coler v. Dwight School Township*, 3 N. Dak. 249, and cases cited.

Many of these cases are cases involving the collection of taxes, but collateral attack on municipal corporations is sometimes attempted in other cases, such as in actions to enforce municipal ordinances, in injunctions to restrain corporate officers from alleged illegal action, or in mandamus proceedings to compel official action. An instance of the latter class is *State v. Whitney*, 41 Neb. 613. This was an application for a writ of mandamus to compel certain city officers to canvass the vote of relator for the office of councilman of the city of Alma. The defendants denied that Alma was a city, but alleged that it was a village having less than the necessary number of inhabitants to constitute it a city of the second class. It had, however, been acting as such a city. It was held: "Where the existence of a municipal corporation is not questioned by the state it cannot be put in issue by a private individual in a collateral proceeding." To the same effect are *Osborn v. Village of Oakland*, 49 Neb. 340; *Cleveland, C., C. & St. L. R. Co. v. Dunn*, 63 Ill. App. 531. The authorities upon all branches of this question are collected in two recent text books: McQuillin, *Municipal Ordinances*, sec. 349, and note, and 1 Abbott, *Municipal Corporations*, sec. 32, and note. In the latter work it is said: "The rule of law invariably is that the state alone can question the right of the public corporation to exist and perform its duties and exercise its rights, and then in a proceeding brought for that purpose. And also that the question of legal corporate existence cannot be raised in a case or proceeding as collateral to the main issue or through collateral attack." So, also, it is said by Judge Cooley in his work on *Constitutional Limitations* (5th ed.), p. *254: "In proceedings where the question whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appears to

be acting under color of law, and recognized by the state as such." This is the doctrine which has been adopted by this court.

The evidence offered by the defendant shows that he never requested nor consented to the annexation of his property to the city of Plattsmouth, but the answer does not allege, and the proof fails to show, that "a request in writing, signed by a majority of the property owners and inhabitants in numbers and value of the territory described in the plat," had not been filed in the office of the city clerk, and there is also a lack of pleading and proof that a certified map and copy of the ordinance were not filed in the office of the county clerk of Cass county. In the absence of evidence to show that these requirements of the law were not complied with, the presumption of regularity applies. Even under the doctrine of the *Nebraska City* case, it is only in the absence of a step which is held to be jurisdictional that a collateral attack can be made upon the annexation. The city council had power to pass the ordinance of annexation if certain conditions were complied with, and there is no affirmative proof that these conditions were not performed. Further, the defendant is plainly guilty of laches. He paid the city taxes from 1888 to 1894, inclusive, and has taken no steps to question the validity of the incorporation, though the ordinance was passed 19 years ago. If the defendant desired to contest the validity of the annexation of his property to the city, he should have done so long ago. *Strosser v. City of Fort Wayne*, 100 Ind. 443.

The former opinion went upon the theory that the annexation proceedings were not merely defective and voidable, but *ultra vires* and void, and followed the *Nebraska City* case. It is now obvious that an act of the legislature was then in force which gave the city council power and authority to annex property to the city of Plattsmouth by ordinance when certain conditions had been performed, and it is not affirmatively shown that these prerequisites had not been complied with.

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For these reasons, as well as for the reason that the annexation proceedings are not subject to collateral attack 19 years afterwards in a private action resisting the payment of taxes, the former judgment is set aside and the judgment of the district court affirmed.

JUDGMENT ACCORDINGLY.

WESTERN UNION TELEGRAPH COMPANY, APPELLANT, v.
DODGE COUNTY, APPELLEE.*

FILED NOVEMBER 9, 1907. No. 14,922.

1. **Taxation: TELEGRAPH COMPANIES: ASSESSMENT.** In assessing the property of a telegraph company having property in more than one state, the value of the whole property as an entirety should be considered, and the relation which the value of the property in the taxing district under consideration bears to the value of the entire property should also be considered.
2. ———: ———: ———. In arriving at the value of the property of a telegraph company in a taxing district, the total gross and net receipts of the system as a whole, as well as in the particular district, may be considered, and so also may the amount of the company's stock and bonds and the market value thereof.
3. ———: **BOARD OF EQUALIZATION: EVIDENCE.** Equalization boards of a taxing district may obtain information of the value of the taxable property under consideration from the best and most reliable source at their command, and the strict rules of evidence applied by the courts in ordinary cases are not applicable to the evidence offered or received by such boards. The district court on appeal may receive proof of any pertinent fact tending to show the value of the property.
4. **Evidence examined, and held sufficient to sustain the finding of the district court.**

APPEAL from the district court for Dodge county:
JAMES G. REEDER, JUDGE. *Affirmed.*

* Rehearing allowed. See opinion, p. 23, *post*.

Courtright & Sidner, for appellant.

John W. Graham, contra.

DUFFIE, C.

The Western Union Telegraph Company made a return to the county assessor of Dodge county showing the actual value of its property, including franchises, in said county on the 1st day of April, 1905, to be \$9,281.20, and assessed valuation \$1,856.24. The actual valuation was raised by the board of supervisors to \$46,406 after a hearing at which the company was represented. Thereupon the company appealed from the action of the board to the district court. Upon the trial the court fixed the actual value of said property at \$54 a wire mile, or \$40,500 for the entire property. From this finding and judgment of the district court the company has appealed.

The court found specially, first, that the appellant has 80 miles of pole lines and 750 miles of wire in Dodge county; second, that there are 1,200,000 miles of wire in the United States owned by appellant, and that the average value throughout the United States is \$54 a wire mile, including franchises; third, that the gross earnings of said system in Nebraska from all sources are \$10.50 a wire mile, and the net earnings for said system in said state are \$1.36 a wire mile; fourth, that the value of the tangible property of appellant in Dodge county is \$12,850; fifth, that the actual value of appellant's property in Dodge county subject to taxation, including franchise value, should be \$54 a wire mile, or \$40,500. It is insisted by appellant that as the value of its tangible property in Dodge county is but \$12,850, or \$17.13 a wire mile, that the difference between this sum and \$54 a wire mile was fixed by the court as the franchise value of plaintiff's property. We cannot agree that this is entirely true. The court, in arriving at the value of appellant's property, took evidence showing the value of its stock and bonds, and this showed the average value per

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pole mile of the entire system to be \$610.17. Second, evidence was taken of the net earnings of the company. This showed the average value per pole mile capitalized on a 4 per cent. basis to be \$989.15; on a 5 per cent. basis, \$791.32; on a 6 per cent. basis, \$659.43. Evidence was also taken of the asset or cost value of all appellant's property embraced in its whole system. This showed the average value per pole mile to be \$685.31, and the cost value per pole mile of its system in the United States, including cable and foreign lines, makes the average value per wire mile in the United States \$54. If either or all of these methods were proper in arriving at the value of appellant's property in Dodge county, the first system would give for 80 pole miles, at \$610.17 a mile, a gross valuation of \$48,813.60. The second method would give a gross valuation of \$52,754.40. The third method a gross valuation of \$54,824.80; and the fourth method 750 wire miles, at \$54 a mile, gives a gross valuation of \$40,500, or the sum found by the court. Section 10477, Ann. St., provides that the gross receipts of express, telegraph and telephone companies shall represent the franchise value of such companies, which shall not be otherwise assessed. This provision of the statute was held unconstitutional in *Western Union T. Co. v. City of Omaha*, 73 Neb. 527, and the assessing authorities are now driven to some other method of ascertaining franchise values. It has long been the rule, not only here, but elsewhere, that in assessing railroad and telegraph property the entire property of the company is to be taken into consideration. In *State v. Sarage*, 65 Neb. 714, it is said: "In assessing railroad and telegraph property, it is the duty of the state board of equalization to secure all reasonable and necessary reliable information relative to the value of the entire property of each corporation assessed, and assess such property as a unit or as one property. * * * Where railroad and telegraph properties are situated in more than one state, it is necessary to consider and determine the value of the whole property, wherever situated, as an entirety,

and then determine what proportion of the whole property is situated and used in this state and subject to taxation therein; the relation such part bears to the whole property as to its value being the basis on which the assessment is to be made. The market value of the stocks and bonds of a railroad corporation is an important factor, with other pertinent information, by which to determine the fair-cash value of the property assessed which is represented by such stocks and bonds. The earnings of a railroad company is evidence of a most important character in determining the true value of the property from which the earnings accrue, and is one of the chief elements which give value to the property, and should be considered in determining the value for assessment purposes of the entire property which is assessed."

From the above quotation it will be seen that the value of the entire property considered as a whole, the value of its stock and bonds and the amount of its earnings, should be considered in arriving at the value of the property. It is true that no expert who had knowledge of the value of appellant's entire property testified upon the trial, but an expert accountant was called, who gave a statement of the amount and value of the stock and bonds of the appellant corporation on April 1, 1905, basing his computation upon figures taken from Poor's Manual and other standard publications. Objection is made to this upon the ground that such evidence was incompetent. Assessors and equalization boards must act upon the best and most reliable information at their command. Poor's Manual is resorted to by the commercial world as an authority upon the amount and value of the stocks and bonds of the several leading corporations in this country, and whatever is good evidence for those dealing in such stocks and bonds cannot be regarded as either immaterial or incompetent for the taxing authorities to act upon. Boards of equalization are not governed in their investigation of the values of taxable property by the strict rules of evidence applied by courts of law in the trial of ordi-

nary cases, and upon appeal from their findings the court may receive evidence of any pertinent fact tending to show the true value of the property. On April 1, 1903, the Western Union Telegraph Company filed with the auditor of state a report of the taxable value of its property in Dodge county. This is the last report of values made by the company previous to the return made to the assessor of Dodge county, and it shows 77.69 pole miles, of the value of \$9,376.90. To the introduction of this report the appellant objected, and it now insists that the evidence is incompetent. We think the presumption must obtain that the physical condition of appellant's property in Dodge county was not allowed to deteriorate between 1903 and 1905, and certainly its value as an income producer has not depreciated during the past two or three years of commercial activity which has pervaded the whole country. It is so well known that the courts of the state will take judicial notice of the fact that previous to the enactment of our present revenue law the assessed value placed on taxable property was many times below its actual value. Under our present system the true actual value is returned, and 20 per cent. of this is taken as the assessed value. Twenty per cent. of the actual value found by the court in the case under consideration would place the assessed or taxable value of the appellant's property in Dodge county at about the figure placed upon it by appellant's officers in 1903. This evidence, while not of the most satisfactory character, had some tendency to show the taxable value of the property in the estimation of the officers of the company and was properly admitted.

Aside from this, we cannot say that the value fixed by the court is not fair and just. It may be true that there are many miles of the lines owned by the company of greater value physically and as an income producer than the same number of miles in Dodge county. At the same time there must be as great or a greater number of miles of much less value, and we cannot say that the board of

equalization or the court did not arrive at a correct determination in placing the value at that figure it did.

Discovering no reversible error in the record, we recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed July 17, 1908. *Former judgment of affirmance adhered to:*

1. **Taxation: TELEGRAPH COMPANIES: ASSESSMENT.** The net earnings of a telegraph company for a single year standing alone is not a proper criterion by which to determine the actual value of its telegraph system.
2. ———: ———: ———. The income derived from messages sent from and received at stations in a given district, which comprises only a part of a great telegraph system, is not the proper measure of the gross earnings of that part of the system within the district, where the lines within the district are used for the transmission of messages having neither origin nor destination in the district.
3. ———: ———: ———. The fact that the net earnings of a telegraph company are 13 per cent. of its gross earnings does not justify the conclusion that the net earnings of a particular district, comprising only a part of the telegraph system, are but 13 per cent. of the gross earnings of such part of the system, in the absence of evidence that the ratio of the net earnings to the gross earnings within the given district is the same as that for the entire system.
4. **Evidence: BOARD OF EQUALIZATION: PRESUMPTION.** The presumption obtains that a board of equalization has faithfully performed its official duties, and that in making an assessment it acted upon sufficient competent evidence to justify its action.
5. **Taxation: BOARD OF EQUALIZATION: APPEAL: BURDEN OF PROOF.** Where a taxpayer appeals from the action of the board of equalization in fixing the value of his property for taxation, the burden is upon the appellant to show that the action of the board is erroneous.
6. **Former opinion in this case, ante, p. 18, adhered to.**

Good, C.

This is a rehearing of the case reported *ante*, p. 18. The appellant in asking for the rehearing acquiesced in all the principles of law laid down in the former opinion, but contended that this court, as well as the district court, erred in applying the law to the facts as disclosed by the record. The district court found that the appellant had 80 miles of pole lines and 750 miles of wire in Dodge county; that it had 1,200,000 miles of wire in the United States, and that the average value throughout the United States was \$54 a wire mile, including franchise; that the gross earnings of the system in Nebraska were \$10.50 a wire mile. It also found the value of the tangible property of the appellant in Dodge county was \$12,850, and that the actual value of appellant's property in Dodge county, subject to taxation, including franchise value, was \$54 a wire mile, or \$40,500. Appellant complains only of the finding which fixed the value of its lines in Dodge county at \$40,500, or \$54 a wire mile, and contends that the evidence does not warrant this finding. It further contends that the evidence does not warrant the finding of the value of the Dodge county lines to exceed \$22 a wire mile. The evidence shows the gross and net earnings of the entire system in the United States to be \$24 and \$3.24, respectively, a wire mile, and that the earning capacity of the lines in Dodge county is a fair average for the state of Nebraska. Appellant urges that, because the earnings per wire mile in Dodge county are far below the average earnings per wire mile for its entire system in the United States, the court should not have found the value per wire mile in Dodge county equal to the average value per wire mile for its entire system, but should have found the value of the lines in Dodge county to be in such proportion to the average value per wire mile of the whole system as the net earnings of the Dodge county lines bore to the average net earnings per wire mile for the system as an entirety. The evidence shows the value of the tangible property of

the appellant in Dodge county to be a trifle over \$17 a wire mile, and the district court in fixing the actual value at \$54 a wire mile clearly included nearly \$37 a wire mile as representing the value of the intangible property. The record is barren of any fact which would show the value of the tangible property of appellant's entire system in the United States. We are unable to ascertain from the record what is the value of its tangible property for the entire system per wire mile, or what proportion of the value of its entire system is represented by tangible, or what proportion by intangible, property. We cannot say whether the proportion of tangible property in Nebraska is greater or less than in the entire system. Appellant's argument that its property was overvalued by the district court rests largely upon one factor, namely, that the alleged net earnings per wire mile in Nebraska are very much less than the net earnings per wire mile for the entire system. If the evidence established the facts contended for by the appellant, we concede that the factor of earning capacity would be a potent one in fixing the actual value of the lines in Nebraska.

We find ourselves unable to view the record as does the appellant. In the first place, the testimony as to the earnings relates to but a single year. There are many reasons which might affect the relative earnings of the different parts of a vast telegraph system, and the earnings of each part might vary from year to year. The expenses of operation are likely to vary, and the net earnings for the entire system might be very small for one year and large the next. A particular district might show a loss for one year and a large profit for the next. So it seems clear that the net earnings for a single year would not be a proper criterion for determining the value of a telegraph system or for a particular part thereof. There is still a greater obstacle to appellant's contention. We do not think there is competent evidence in the record from which either the gross or net earnings of the lines in Nebraska can be ascertained. Appellant's witness testified

that the gross and net earnings of the lines in Nebraska were \$10.50 and \$1.36, respectively, a wire mile. But upon what does he base this testimony? He obtains the gross earnings by taking the income from messages which have been either sent from or to a station in Nebraska. No account is taken of the transcontinental messages which go over the wires in Nebraska, which have neither origin nor destination in Nebraska. We are unable to say that the income from messages going from or coming to Nebraska stations represents the gross earnings of the wires in Nebraska. To illustrate: Suppose appellant has a line of poles carrying a dozen or more wires across a district in which there is no telegraph station; the wires may be in constant use and yielding a large profit, yet, according to appellant's theory, there would be neither net nor gross earnings in this district, because no messages were sent from or received within the district. In addition to this, we think it is inferable from the evidence that the witness in fixing the gross earnings for Nebraska lines took into account only the money received in the stations in Nebraska. There is nothing in the record to show what proportion of the messages sent from Nebraska were prepaid, nor what proportion of the messages received were collected for in this state. Under these circumstances, the testimony of the witness as to the gross earnings in Nebraska was of no practical value. His testimony as to net earnings presents a greater state of chaos. It was shown that for one year the net earnings of the entire system were 13 per cent. of the gross earnings. There is no evidence to show that this proportion of the gross earnings would be applicable to Nebraska. Nor is there anything in the record from which it can be determined that this percentage would hold good for a series of years. We think it is apparent that the witness assumed that the percentage for one year was applicable for Nebraska, and used that as a basis for determining the net earnings of the lines in Nebraska for one year. Appellant has attempted, therefore, to fix the net earnings of the lines in

Nebraska by taking a certain percentage of the alleged gross income. The gross income taken as a basis is not shown to be correct, nor is the percentage shown to be applicable to the Nebraska lines. It amounts to this: That the witness has multiplied one error by another. No one will assume that the result is correct.

Certain other facts disclosed by the record, while not conclusive, have some persuasive force which tends to sustain the findings of the district court in fixing \$54 a wire mile as the value of the system in Dodge county. It is shown that the average number of wires per pole in the United States is something less than six, while in Dodge county the number of wires per pole averages a little more than nine. We think it fair to assume that a business corporation like the appellant would not string nine or more wires to its system of poles if five or six were sufficient to transact its business. If five or six wires per pole per mile for the entire system produces a net income of \$3.12 a wire mile, it would appear that a system where nine or more wires are used would produce as great, if not a greater, income than a system of a less number of wires per pole. It may be that the evidence in the record is not sufficient to affirmatively show that the value of appellant's plant in Dodge county is \$54 a wire mile, as found by the trial court, but of this the appellant is not entitled to complain. The rule of law seems to be quite well settled that, in the absence of evidence to the contrary, the presumption is that public officials faithfully and legally perform their legal duties, and that in making an assessment the board of equalization proceeded upon sufficient and competent evidence to justify its action. *State v. Western Union T. Co.*, 96 Minn. 13, and cases there cited; *State v. Savage*, 65 Neb. 714. In *Lancaster County v. Whedon*, 76 Neb. 753, it was held that, where a taxpayer appeals from the action of the board of equalization in the matter of assessment of property for taxation, the burden is upon the appellant to show that the decision of the board is erroneous. It would follow that the

presumption obtains that the value fixed by the board of equalization of Dodge county was correct, in the absence of evidence to the contrary. The burden of proof being upon the appellant to satisfy the trial court that the board of equalization had erred in fixing the valuation of its property, the appellant is not in position to complain, unless it has produced evidence to overcome the presumption. As the district court fixed a lower valuation upon appellant's property than the valuation fixed by the board of equalization, the error, if any, was against the appellee, and not against the appellant.

We have been asked to formulate and state a plan for determining the value of the property of telegraph companies for assessment in this state. The law requires that their property shall be listed at its actual value, and, where the legislature has not formulated or fixed any plan by which such value may be ascertained, it would appear that any course is open to the parties interested to pursue any plan and offer any evidence whereby the actual value may be determined. It is not within the province of the court to lay down or formulate any rule which must be followed for the purpose of ascertaining the actual value for purposes of assessment. To do so would be to usurp the functions of the legislative branch of the government.

The record fails to disclose any error of the district court prejudicial to the appellant. We recommend that the former opinion be adhered to, and that the judgment of the district court be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the former opinion in this case is adhered to, and the judgment of the district court is

AFFIRMED.

E. R. HITCHCOCK, APPELLANT, v. VALENTINE ZINK ET AL.,
APPELLEES.

FILED NOVEMBER 9, 1907. No. 14,958.

1. **Highways: IMPROVEMENT.** A public road is for use by the traveling public, and may be improved to accommodate footmen, as well as those using it for teams, wagons or other vehicles.
2. ———: **SIDEWALKS.** A sidewalk constructed outside the traveled way for teams, but within the boundaries of the road, does not constitute an additional burden added to the easement possessed by the public in the land over which the road passes.
3. ———: ———. The owner of the fee cannot complain that a sidewalk is being constructed along a public road by private parties, where permission to build the walk has been granted by the board of county commissioners.

APPEAL from the district court for Johnson county:
WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

George A. Adams and E. R. Hitchcock, for appellant.

S. P. Davidson and J. C. Moore, contra.

DUFFIE, C.

The village of Sterling is located upon the eastern part of section 26, township 6 north, of range 9 east, in Johnson county, Nebraska. For more than 20 years prior to the commencement of this action there had been in use a public road running east from the village of Sterling along the east and west half section line of section 25, in said township and range, and extending east for more than two miles from the corporate limits of the village. The plaintiff and appellant is the owner of the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section 25; the road before mentioned running between these two tracts. A burial ground, known as the "Sterling Cemetery," is located on the road

just east of the plaintiff's north 40, and this cemetery has been in use for more than 20 years. The road in question is the only avenue leading from the village to the cemetery, and the evidence discloses that the road, for a part of the distance between the village and the cemetery, passes over low, wet ground, making it inconvenient, if not impassable, for footmen during a wet or rainy period. For the purpose of improving the road and beautifying the cemetery grounds, the ladies of Sterling and that vicinity organized themselves into a voluntary association (not incorporated), and procured from the board of county commissioners permission to build a sidewalk along said road from the corporate limits of the village to the west boundary line of the cemetery, on either side of said highway, and, if built on the south side, then north across the highway to the south line of the cemetery grounds. Acting on this permission, the association purchased material, and the defendants, acting in its behalf, were about to commence the construction of a sidewalk along the south side of the road, when the plaintiff brought this action, asking an injunction to prevent the improvement being made. Upon the trial of the case the plaintiff's petition was dismissed, and he has appealed to this court, alleging that the highway was never established by the public authorities or by any proceedings of record; that it is a highway by user only; that the ground taken by the walk is not, and never was, a part of the highway, never having been used by the traveling public, and never dedicated to public use.

In this connection, it is sufficient to say that in his petition he alleges that there is running through the plaintiff's land east and west, and near the center thereof, a public highway, and that defendants have commenced grading for and laying a brick and stone sidewalk "through said land on the south side of said highway, and are threatening to continue, and are continuing, to grade for and build said sidewalk by digging cuts, building grades and laying brick therein and thereon." Aside from the evidence

showing the use of this highway for 20 years and more is this allegation of the petition distinctly recognizing its character as a public road, and distinctly alleging that the walk complained of is being laid "on the south side of said highway," and that defendants "are digging cuts, building grades and laying brick therein and thereon." It is clear that the plaintiff is estopped by the allegations of his petition from denying the public character of the road, or claiming that the sidewalk is being constructed outside the limits thereof.

It is further urged that defendants are building this walk as private individuals and in a private capacity, and utterly without right or authority. The roads of this state are under the control and supervision of the board of county commissioners where located, and authority derived from such board to make improvements in the road which better accommodate public travel is a sufficient defense as against this claim. Acting by permission of the county authorities having charge of the road, the defendants must undoubtedly be regarded as agents of the county in making the improvement, and not as trespassers upon the highway.

It is also said that the walk obstructs the plaintiff's ingress and egress to and from his land, to his serious damage, and materially interferes with his use thereof. The rule is that, where an owner of land dedicates it to the public for a road or street, he impliedly grants the attendant right to make such use of it as shall suitably fit it for travel. *Warren v. City of Grand Haven*, 30 Mich. 24; *City of Boston v. Richardson*, 13 Allen (Mass.), 146. And "where land is seized under the power of eminent domain, compensation is measured upon the theory that the officers representing the public may so prepare and maintain it that the public may safely and conveniently use it as a passageway." Elliot, *Roads and Streets* (2d ed.), sec. 465. A public road is for the use of the public and may be used as the public convenience requires, either as a way for footmen or for driving purposes. The statutes of our

state require the public authorities to keep the roads in good repair and safe for use. There is no more objection to the improvement of a road for footmen than for the passage of vehicles, and the construction of a sidewalk along a public road is not an additional burden added to the easement which the public have acquired therein. In *Ryan v. Preston*, 69 N. Y. Supp. 100, it was held that a bicycle path along a public highway is not an additional burden. And in *Pillsbury v. Brown*, 82 Me. 450, 9 L. R. A. 94, the building of a sidewalk within the limits of a road established by prescription was held not to constitute a trespass. It has also been held that, if public necessity or convenience requires the improvement of a highway, it is immaterial at whose expense it is made. *Pillsbury v. Augusta*, 79 Me. 71; *Gay v. Bradstreet*, 49 Me. 580. If the improvement was negligently constructed to the injury of the plaintiff or his estate, he undoubtedly has a remedy for the wrong done him, but he cannot maintain an injunction against a proper improvement made upon a public highway. The complaint that the walk obstructs his ingress and egress to and from his land is fairly met, we think, by the evidence to the effect that the walk is no obstruction, and the defendants, during the building of the walk, offered to construct crossings at such points as the plaintiff might designate, which offer was refused upon the ground that defendants had no right to construct the walk and that this action was pending to enjoin the work of construction. We have no doubt of the right of the public authorities to improve the road in the manner complained of, or of permitting it being done by other interested parties. The walk is not an obstruction to public travel, but a great convenience to foot passengers. It does not constitute an additional burden upon the servient estate held therein by the plaintiff. He cannot complain of the improvement made, and can only insist that it shall not be done in a negligent or careless manner, to his injury.

We discover no error in the action of the district court,

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and recommend an affirmance of the judgment appealed from.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment appealed from is

AFFIRMED.

**LOLA M. HUNT, APPELLEE, V. STATE INSURANCE COMPANY,
APPELLANT.**

FILED NOVEMBER 9, 1907. No. 14,953.

1. **Second Appeal: LAW OF CASE.** The rules previously announced in this case (*Hunt v. State Ins. Co.*, 66 Neb. 125) held decisive of the questions now at issue.
2. **Insurance: AGENTS.** A local agent of the defendant insurance company procured a certificate of authority from the state auditor before the policy in suit was issued, and was holding such certificate at the time the policy was issued, but failed to procure a renewal certificate of authority in subsequent years, but continued to act as the agent of the defendant company, and the company recognized him as their agent and accepted all business coming through his agency, and never canceled his contract of agency. *Held*, That the company is bound by his acts and conduct in dealing with policy holders.

APPEAL from the district court for Dakota county: GUY T. GRAVES, JUDGE. *Affirmed.*

R. E. Evans and *C. J. Garlow*, for appellant.

T. F. Bevington and *William P. Warner*, *contra*.

EPPERSON, C.

On a former hearing this case was remanded to the district court for a new trial. *Hunt v. State Ins. Co.*, 66 Neb. 125. A trial was had, resulting in a judgment for the plaintiff. Defendant appeals.

It is again urged that the policy of fire insurance sued on was rendered void by reason of a change in the occupancy of the dwelling house insured. The evidence now before us relative to the agent's knowledge of the change in the occupancy of the premises in controversy is the same as that given at the former trial, and this question was disposed of adversely to the contention of defendant when the case was before the court on rehearing. Reasons for the conclusion reached may be found in the opinion of Mr. Commissioner POUND, and need not be repeated here.

But defendant now contends that the alleged local agent was not the defendant's agent when the occupancy was changed, and therefore notice to him was not sufficient to bind the defendant. The evidence shows that the auditor of this state did not issue a certificate to the said agent, authorizing him to act as such, subsequent to the year 1891, as provided by statute. The evidence shows that the alleged agent issued the policy to the plaintiff in 1891, and continued soliciting business for the company until after the plaintiff's loss, sending in notices of changes in the policies issued by him as agent, including one indorsement upon the policy in question. We find, moreover, the deposition of one of the officers of the defendant company in which he says that the agency in controversy continued from its inception (long prior to the date of plaintiff's policy) until the agent removed from the state, which was after the loss complained of. Defendant recognized him as its agent and received the benefits of his efforts in soliciting insurance. He was a recording agent authorized to issue policies and collect premiums. It is bound by his acts and conduct to the same extent that it would be had he procured a certificate from the auditor for each of the years he was so acting.

In 1893 plaintiff leased the premises to one Shook, and requested the occupant, Anderson, to vacate. On August 23 Anderson was engaged until about 9 o'clock P. M. in removing his effects. The house burned a few hours later. Shook was to take possession as soon as the house was

vacated. Defendant contends that the house was vacant when it burned, and thereby the policy was rendered void by an express provision to that effect. Anderson and his wife were the only witnesses who knew what, if any, of their effects remained in the house and were burned. At most, it appears that only a few articles were in or about the house, and these he intended to remove the next morning. Their testimony was not given at the last trial, but the testimony they gave at the former trial was read in evidence. Therefore the same evidence in regard to their removal from the premises was before this court when Mr. Commissioner POUND said: "But there was some dispute as to whether the tenant had removed all his effects; and whether, under the circumstances, there was a vacancy, or a mere temporary cessation of occupancy until the tenant was fully removed and some one else could be put in, was a question for the jury." *Hunt v. State Ins. Co., supra*. The rules announced in the opinion referred to became the law of the case, and we see no reason for departing therefrom. The question was submitted to the jury as this court previously held it should be.

Many errors are assigned which we need not discuss. We have carefully examined the record with reference to the assignments and find no prejudicial error.

We therefore recommend that the judgment of the district court be affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

HOMER H. NORTHUP ET AL., APPELLEES, V. EDWARD W.
BATHRICK, APPELLANT.

FILED NOVEMBER 9, 1907. No. 14,963.

1. **Pleading: VERIFICATION.** The verification of a pleading is not jurisdictional, and the failure to verify is waived unless objection is made before trial.
2. **Estoppel: PRINCIPAL AND AGENT.** By correspondence, plaintiffs, who are real estate brokers, arranged with a landowner for a sale of his land to a stranger, and during the negotiation demanded a certain sum as their commission, which, upon consummation of the sale, was paid to them. *Held*, That the plaintiffs will not be heard to say that they were not the agents of the vendor.
3. **Replevin: DEFENSES.** A replevin action against a tenant for the possession of grain due from him as rent may be defeated by a showing that the title and right to possession is in a third person.
4. **Principal and Agent.** An agent, having authority to sell both real and personal property for a certain sum, cannot, without the consent of his principal, take over to himself the personal property upon receiving the authorized sum for the real estate.

APPEAL from the district court for Furnas county:
ROBERT C. ORR, JUDGE. *Reversed.*

W. S. Morlan, for appellant.

John Stevens, Jr., *contra.*

EPPERSON, C.

Plaintiffs, Northup and Renie, were successful in the lower court in this an action of replevin to recover from defendant, Bathrick, about 800 bushels of wheat, and the latter appeals.

In 1905 plaintiffs were engaged in the real estate business at Arapahoe, Nebraska. J. W. Tomblin, a nonresident of this state, owned a farm of 320 acres a few miles from that village. The defendant occupied it as tenant,

giving \$50 and one-third of the crop as rent. May 2, 1905, plaintiffs sent Tomblin the following telegram: "What is your best price on half-section north of Arapahoe? Can get you thirty per acre. Answer." Tomblin replied: "Sell thirty-five per acre including crops. Half on time at seven if desired." Plaintiffs sold the land, and on May 25 wired Tomblin: "We have sold your farm at thirty-five. Will write you fully." Plaintiffs thereupon wrote Tomblin explaining the terms of sale. The price received was \$35 an acre and the crop, the purchaser paying \$6,200 in cash, and giving a mortgage for the remainder. The letter instructed Tomblin to send deed, abstract, and assignment of the lease either to the plaintiffs or to the First National Bank of Arapahoe. The name of the grantee was to be inserted in the deed later, and the assignment of the lease was to be in blank. In the event the papers were forwarded to the bank, the bank was to be directed to turn over \$305 to the plaintiffs as commission when the deal was closed. May 31 Tomblin forwarded the deed, the abstract, and the assignment of the lease, with a letter containing, among other things, the following: "When sale is consummated you can pay Northup and Reinie \$305. Com." This sum was paid to plaintiffs, and it was understood by all parties that \$305 was the usual commission and that plaintiffs were entitled to the same. When the deal was finally closed, the name of the purchaser, Robert Goethe, was inserted as grantee in the deed, and the names of plaintiffs were inserted as assignees of the lease. When Tomblin became aware of the fact that the purchaser of the land was not to receive the benefits accruing under the lease, but that all benefits were to go to his agents, the plaintiffs herein, he instructed the defendant, his tenant under the lease, not to turn over the rent to the plaintiffs, and, upon defendant's refusal to deliver one-third of the wheat, plaintiffs brought this action, with the result as hereinbefore stated.

1. It is argued by plaintiffs that the judgment should

be affirmed for the reason that defendant failed to verify his answer. The failure to verify the pleading did not oust the court of jurisdiction. *Johnson v. Jones*, 2 Neb. 126; *Dorrington v. Meyer*, 8 Neb. 211. Besides, this objection to the answer was not raised before trial, and cannot now be considered. *Schwarz v. Oppold*, 74 N. Y. 307.

2. After sending the telegrams and letters preserved in the record, and receiving and acting upon Tomblin's answers thereto, and accepting the sum requested and obtained by plaintiffs from Tomblin as commission, plaintiffs will not be heard to say that there was no contract of agency. See *Quertermous v. Taylor*, 62 Ark. 598, 37 S. W. 229.

3. Neither can it be claimed that defendant should be required to surrender the property to plaintiffs because his landlord (Tomblin) did not intervene and establish his right to possession. The rule is well established that in replevin the plaintiff must rely upon the strength of his own title, and cannot rely upon the weakness or lack of title of his adversary. *St. John v. Swanback*, 39 Neb. 841; *Johannson v. Miller*, 45 Neb. 53; *Herman v. Kneipp*, 59 Neb. 208. Defendant was in possession of the wheat as tenant of Tomblin, and it was competent for him to challenge the plaintiffs' title and defeat it by showing title and the right of possession in a third person. *Sutro v. Hoile*, 2 Neb. 186; *Fuller v. Brownell*, 48 Neb. 145. .

4. Defendant seeks a reversal for the reason that the judgment is not supported by the evidence; that the evidence shows that plaintiffs did not in fact make a sale of the crops, but, under a pretense to him that the crops were sold or the rents assigned, attempted to appropriate the same to their own use. No rule is better settled than that an agent is required to disclose to his principal all the information he has touching the subject matter of the agency, and that his relation to his principal forbids his becoming a purchaser thereof for his own benefit, in any way, without the full knowledge of the principal of this fact. *Jansen v. Williams*, 36 Neb. 869, and cases there

reviewed and approved. In *Rockford Watch Co. v. Manifold*, 36 Neb. 801, Mr. Commissioner IRVINE said: "The evidence does not disclose any fraud or even unfairness in his (the agent's) conduct, but such transactions upon the part of an agent are voidable at the option of the principal without regard to the existence of actual fraud. They are voidable, not because there *was* fraud, but because there *might be*, and because the law, upon grounds of public policy, will not permit an agent to assume a position where conflicting interests will expose him to the danger of sacrificing his principal to himself. The doctrine extends to all cases of agency with almost the same force as to cases of trusts, and has been applied in every adjudicated case, so far as we are aware, to agents for the purpose of selling goods or land. It has been held to apply to public sales as well as private, and even to an agent empowered to sell at a stipulated price. The principle is well stated in Pomeroy's Equity Jurisprudence (2d ed.), sec. 959, where a vast number of authorities are collated." Mr. A. C. Freeman has annotated this question in the American State Reports. See authorities collected in his excellent note to *Kimball v. Ranney*, 80 Am. St. Rep. 549 (122 Mich. 160). The reasons for the doctrine are stated by RYAN, C., in *Jansen v. Williams*, *supra*, and repetition here is unnecessary. Under the rule established by the authorities, we are clearly of the opinion that plaintiffs in the case before us should not have taken the assignment of the lease without their principal's knowledge or consent, nor claimed title to the crop which their principal supposed he was selling to his grantee. In fact the crop never was sold, and, when the principal became aware of the true situation, he was entitled to disregard the apparent assignment and retain control of the property, and plaintiffs were not justified in attempting to dispossess his tenant. It will best serve "the general interests of justice and the safety of those who are compelled to repose confidence in others" to adhere strictly to the rule of the authorities above cited;

for, "if such a transaction as is exhibited by the undisputed facts of this case could stand for a moment, the well-established rules that an agent to sell cannot himself become a purchaser, and that one who undertakes to act for another in any matter shall not in the same matter act for himself, would be so easy of evasion, and breaches of them so readily covered up by contrivances, that they would cease to be of any practical value. When agents, and others acting in a fiduciary capacity, understand that these rules will be rigidly enforced, even without proof of actual fraud, the honest will keep clear of all dealings falling within their prohibition, and those dishonestly inclined will conclude that it is useless to exercise their wits in contrivances to evade it. Thus only can these rules be made useful in promoting fair dealing on the part of agents and trustees, and in preventing frauds." Rapallo, J., in *Bain v. Brown*, 56 N. Y. 285. The reasons for the rule apply with greater force to the case at bar. The agents here parted with nothing of value, but attempted to acquire title without paying any consideration whatever to their principal.

Plaintiffs attempt to justify their conduct in this way: They claim that Tomblin parted with his title to the land and to the crop to Goethe, the purchaser, and that they acquired title to the crop from Goethe for a valuable consideration. This contention is not sustained by the evidence. There is nothing in the record tending to show that the purchaser acquired the assignment of the lease and then transferred his interest therein to the plaintiffs. It is undisputed that the lease was assigned in blank and plaintiffs' name inserted without the knowledge or consent of Tomblin, their principal, and that the purchaser never knew that the crops were offered with the land, or that Tomblin intended to sell the crops or assign his lease. The claim of plaintiffs rests upon indefensible grounds and cannot be sustained.

The judgment of the district court should be reversed

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and the cause remanded for further proceedings, and we so recommend.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

PLATTE COUNTY INDEPENDENT TELEPHONE COMPANY, APPELLANT, v. LEIGH INDEPENDENT TELEPHONE COMPANY, APPELLEE.*

FILED NOVEMBER 9, 1907. No. 14,765.

Injunction: CONTRACT, BREACH OF: STATUTE OF FRAUDS. A court of equity will not enjoin the breach of an oral contract which by its terms is not to be performed within one year from the making thereof.

APPEAL from the district court for Colfax county:
JAMES G. REEDER, JUDGE. *Affirmed.*

J. J. Sullivan and C. J. Garlow, for appellant.

Thomas & Cain, contra.

GOOD, C.

Appellant commenced this action in the district court for Colfax county against the appellee, alleging that both plaintiff and defendant were corporations organized under the laws of Nebraska and engaged in the general telephone business, plaintiff in Platte county, and defendant in Colfax county; that the principal place of business of the

* Rehearing allowed. See opinion, p. 46, *post*.

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plaintiff was the city of Columbus, and that of the defendant the village of Leigh; that about the first of June, 1904, plaintiff and defendant entered into a contract by which it was agreed that the telephone lines of the respective parties should be connected at the town of Creston, in Platte county, in the exchange there maintained by the plaintiff, and whereby the subscribers of the plaintiff were to be furnished telephone facilities and service over the lines of the defendant, and the patrons of the defendant were to be furnished similar facilities and service over the lines of the plaintiff, and that the said contract was to be continued in force for five years from its date; that in pursuance of and as a part of said agreement plaintiff changed its telephone lines from Columbus to Creston from a grounded to a metallic circuit, and defendant extended its lines from Leigh to Creston and connected with plaintiff's exchange. Plaintiff further averred that in November, 1904, it sold its Creston exchange to the defendant for the consideration of \$1,250, to be paid in stock of the defendant company to be thereafter issued, and that in pursuance of said contract it turned over to the defendant its telephone exchange at Creston, and that the inducement for the sale of the Creston exchange was the alliance and interchange of business between the two companies, and that this was considered as an inducement to the sale was understood by both parties at the time of the sale. It also averred that some months thereafter the defendant company entered into a contract with the Nebraska Telephone Company, whereby those two companies had formed a business connection and alliance to the exclusion of the plaintiff, and that under and by virtue of the agreement between the defendant and the Nebraska Telephone Company the plaintiff and its patrons will be cut off and excluded from the use of the lines of the defendant company, and that it will be denied the right of interchange of business with the defendant and its patrons, as contemplated by the contract between the parties to this action. These allegations were followed by appropriate allegations as to

the nature of the damages and injuries plaintiff will sustain if the defendant is permitted to disconnect the telephone lines of the parties to this action, and plaintiff prays for an injunction restraining the defendant from carrying into effect its agreement with the Nebraska Telephone Company, in so far as said contract contemplates the exclusion of the plaintiff from the use of the lines of the defendant company, and in so far as it contemplates the exclusion of the patrons of the defendant company from the use of the lines of the plaintiff company, and a suspension of the interchange of business between the companies plaintiff and defendant. Defendant answered, admitting the corporate existence of the parties and the general nature of the business of each, and admitted an oral agreement with the plaintiff, whereby it was to connect its telephone system with that of the plaintiff at Creston, and denied all the other allegations of the plaintiff's petition. It also pleaded affirmative allegations, which need not be noticed. There was a trial to the court, resulting in findings and judgment in favor of the defendant, dissolving the temporary injunction that had been issued at the commencement of the action, and dismissing the action of the plaintiff. To reverse this judgment plaintiff appeals to this court.

With reference to the second contract, whereby the sale of the Creston exchange was said to have been made, it is sufficient to say that the evidence fully discloses that, while negotiations were had between the parties for the sale of the exchange, they never ripened into a sale, and we have, therefore, only to deal with the rights of the parties as affected by the first agreement made in June, 1904, for the interchange of business between the two companies. The Nebraska Telephone Company is not made a party to this action, nor is any alleged contract between the defendant and the Nebraska Telephone Company set out in the pleadings, nor are the terms of any such contract disclosed by the evidence. Plaintiff asks that defendant be enjoined from carrying out its contract with

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the Nebraska Telephone Company, in so far as the said contract might require the defendant to disconnect its lines from the plaintiff's lines, and to refrain from interchange of business with the plaintiff. But, without the Nebraska Telephone Company being made a party, and without the contract between it and the defendant being brought before us, we are at a loss to understand how we could hold such a contract inoperative, or to enjoin the carrying out of any of its provisions between the parties to it. We take it, however, that the real point aimed at by the plaintiff is to enjoin a breach of the contract of June, 1904, between the plaintiff and defendant.

It is a familiar doctrine that courts of equity will interfere to prevent the breach of an executory contract, where the breach thereof by one party would work irreparable injury to the other, especially where an award of damages for a breach thereof would not adequately compensate the injured party. But, in order to invoke the aid of a court of equity to restrain the breach of a contract, it must first be shown that a valid and subsisting contract susceptible of enforcement exists between the parties. In the present action the evidence discloses that the agreement of June, 1904, between the parties was not in writing, and the record leaves the court in doubt and uncertainty as to the period of time the contract was to run. Plaintiff alleges in its petition that the contract was to extend for a period of five years from its date. One of its witnesses states that it was to run for five years, and one that it was to run for three years, but in any event the contract by its terms was one not to be performed within one year from the making thereof.

Defendant has invoked the protection of the statute of frauds. Section 5957, Ann. St. 1903, reads in part as follows: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: First, every agreement that, by its terms, is not to be performed within one year from the

making thereof." Plaintiff seeks to avoid the force of the statute by contending that the contract had been practically executed, and that the conditions thereof had been performed, and the respective parties were doing business and serving their respective patrons over each other's lines, and that the division of tolls and settlements and manner of management were incidents and minor matters growing out of the real contract. It is true that there were several matters mentioned as a part of the contract, to wit: That a certain subscription list should be turned over by the plaintiff to the defendant, and that plaintiff should change its telephone lines between Columbus and Creston from a grounded to a metallic circuit, and that the defendant should build and extend its lines from Leigh to Creston; but, as we view it, the main object of the agreement was the interchange of business between the two companies, and the matters of building the lines and connecting the two telephone systems together were incidental to the main contract, to wit, the exchange and interchange of business. In fact, it is a breach of contract to interchange business against which the plaintiff asks relief. It appears clear to us that the plaintiff has wholly failed in its attempt to show that the contract is not within the statute of frauds, and that the contract falling under the ban of the statute is void, and that no rights can be asserted under it, and that a breach of it cannot be enjoined.

While holding the contract void and unenforceable under our statute, we do not wish to be understood as expressing any opinion upon the right of the appellant to compel by proper action an exchange of business between the two companies upon equitable terms. The issues raised in the pleadings with reference to the second contract are not urged by the appellant, and are, therefore, not considered.

For the reasons given, the judgment of the district court was right and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed May 7, 1908. *Former judgment of affirmance adhered to:*

1. **Statute of Frauds: EXECUTED CONTRACT.** Where an oral contract has been fully performed by the parties, or by one of them, it is not void under our statute of frauds, even though incidental matters growing out of the contract, such as a division of profits, may be required by its terms for a series of years.
2. **Injunction: CONTRACT, BREACH OF.** The breach of an oral contract by one of the parties will not be restrained, where the terms of the contract are in doubt, or so indefinite and uncertain that a court would not decree specific performance thereof.

DUFFIE, C.

A rehearing was granted in this case, and it has been again argued and submitted. The facts are fully set out in the opinion of Mr. Commissioner GOOD, *ante*, p. 41. We have again carefully examined the evidence contained in the bill of exceptions, and fully considered the briefs and arguments made upon the second presentation of the case, and are satisfied that our first opinion, with perhaps some modifications, should be adhered to.

In our former opinion we held that the contract between the parties was void under our statute of frauds, for the reason that it could not be fully performed within one year from the making thereof. Further consideration of the case impresses us with a doubt of the correctness of this holding. So far as the plaintiff is concerned, the contract was apparently performed on its part; and in the exhaustive opinion of this court in *Kendall v. Garneau*, 55 Neb. 403, it is said: "That portion of our statute of frauds which brings within its inhibition verbal or unsubscribed agreements which by their terms are not to be performed within one year from the time of making does not

extend to agreements wholly performed on one side within the year." It is true that as a result of the agreement entered into between the parties the revenue derived from an interchange of business was to be divided between the two companies on a basis of one-fourth to the defendant and three-fourths to the plaintiff, and this disposition of the income arising from the use of the lines was to continue during the life of the agreement. We do not think that this can be urged as a reason for holding the contract void, any more than could an oral partnership agreement for a term of years, but which was fully consummated by each of the partners contributing their share of the capital stock and engaging in the business contemplated by the agreement, be held void because of the future division of profits and losses. The fact that the profits and losses arising from the conduct of the business is to be divided between the partners in proportion to the amount contributed by each is a mere incident arising from the consummated contract. While there is some conflict in the opinions, the weight of authority seems to be that no written articles are necessary to constitute a copartnership which is to take effect immediately; while a written agreement is necessary to bind parties to enter into a future copartnership which is not to commence until after the expiration of a year. *Smith v. Tarlton & Finley*, 2 Barb. Ch. (N. Y.) 336; *National Bank v. Van Derwerker*, 74 N. Y. 234; 1 Bates, Law of Partnership, secs. 208, 209. It would seem that the same principle should govern the present case.

On another branch of the case we said in our former opinion that "it is a familiar doctrine that courts of equity will interfere to prevent the breach of an executory contract, where the breach thereof by one party would work irreparable injury to the other, especially where an award of damages for a breach thereof would not adequately compensate the injured party. But, in order to invoke the aid of a court of equity to restrain the breach of a contract, it must first be shown that a valid and subsisting contract

susceptible of enforcement exists between the parties." This is the undoubted rule followed by all courts. 22 Cyc. 855. The evidence regarding the length of time which the contract between the parties was to run is extremely conflicting, and no one can tell whether it was to continue three years or five. The plaintiff in its petition alleged that the contract was to continue for five years. One of the plaintiff's witnesses testified that it was to run five years, and one for three years. The defendant's witnesses all testified that the contract between them was to continue for an indefinite time, and we are unable to say from the evidence before us what length of time the contract was to continue. Such a contract could not be specifically enforced, and if it could not be specifically enforced a breach therefore by one of the parties will not be restrained, at least, if the party against whom relief is asked has performed on his part for a reasonable length of time, and the record is barren of any evidence on this point.

It is also urged in the argument that defendant is a common carrier of news, and that it cannot refuse to interchange business with the plaintiff; that public policy and the requirements of business demand that telephone companies shall connect and interchange with each other. The case was not brought nor tried upon such a theory. The action was founded wholly upon the contractual relations said to exist between the parties. When the right of the plaintiff to compel an interchange of business with defendant company is presented to us in a proper action, it will be time enough to determine that question. It would be unfair to the defendant and to the trial court to base a decision upon a question that was never presented to the district court. Whether an interchange of business between the defendant company and the Nebraska Telephone Company, or with the plaintiff, or with both these companies, would be most conducive to the public interest was not an issue in the case, and is not for us at this time to determine.

Hackney v. McIninch.

We recommend an adherence to the former opinion.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former opinion is adhered to.

AFFIRMED.

WALTER W. HACKNEY, APPELLEE, v. MITCHELL S. MC-
ININCH ET AL., APPELLANTS.

FILED NOVEMBER 9, 1907. No. 14,801.

APPEAL from the district court for Nemaha county:
WILLIAM H. KELLIGAR, JUDGE. *Rehearing denied.*

M. S. McIninch and H. A. Lambert, for appellants.

Stull & Hawxby, contra.

GOOD, C.

In his motion for a rehearing herein, appellant alleges that our opinion in this case (79 Neb. 128) is based on the erroneous assumption that Jones acquiesced in Hackney's taking possession of the land in question on March 8, 1905; and insists that as Jones was still in possession of the premises, as the tenant of McIninch, injunction would not lie to dispossess him. We are now inclined to the view that the opinion assumes a state of facts slightly different from that shown by the record. It would seem that Jones did not, at least openly, acquiesce in Hackney's putting Andrews in possession of the premises, but this, in our view of the case, is wholly immaterial. It appears that in 1903 the Bedford heirs were the owners of the land which was then leased to Mrs. Gilbert, who sublet it to Jones. Some time in November, 1903, McIninch took

an assignment from Mrs. Gilbert of her interest under the lease. He therefore became the tenant of the Bedford heirs. Mrs. Gilbert's lease expired on the first day of March, 1904, and thereafter neither McIninch nor Jones had any shadow of right to the possession of the premises. Hackney in the meantime had become the owner by purchase from the Bedford heirs, and McIninch, without having surrendered possession to him, assumed to assert some superior right thereto. But there is no evidence in the record to justify any conclusion, or even a suspicion, that he ever had a shadow of right to the land. He and Jones no longer claimed as tenants of Hackney, or as tenants of Hackney's grantors. They therefore became either tenants at sufferance or mere trespassers. Neither Jones nor McIninch recognized Hackney as the landlord. In this view of the case, we are of opinion that it mattered not whether Jones acquiesced or consented to Hackney's taking possession, and the only remaining question is: Did Hackney obtain possession in March, 1905?

From an examination of the record, we are of the opinion that Hackney and his tenant, Andrews, obtained possession of the land at that time. If this be true, Jones and McIninch were mere trespassers, and their repeated trespasses, assaults and threats against Hackney and his tenant were sufficient to justify the issuance of an injunction. Had McIninch or Jones claimed to be the tenant of Hackney, then Hackney might not have been entitled to that remedy. It seems clear, however, that neither McIninch nor Jones, until they had surrendered possession to Hackney, was in position to assert any title adverse to that claimed by him. They do not assert or claim any rights as tenants of Hackney, and they are in no position to assert any rights adversely to him. In fact, they had none to assert, except the rights of trespassers, and, when the rightful owner has obtained possession of land as against trespassers who repeatedly interfere with his peaceable enjoyment thereof, he is entitled to have his possession protected by an injunction. Such appears to

be the situation in this case, and we recommend that a rehearing be denied.

DUFFIE and EPPERSON, CC., concur.

By the Court:

REHEARING DENIED.

ELIZA J. ELLIS, APPELLANT, v. CITY OF KEARNEY,
APPELLEE.

FILED NOVEMBER 9, 1907. No. 14,874.

Cites: INJURY: NOTICE. The maxim that physical incapacity to perform a duty enjoined by law excuses nonperformance, is not available to extend the time, or afford an opportunity, to fix a statutory liability upon another. *Schmidt v. City of Fremont*, 70 Neb. 577, followed and approved.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed*.

Hamer & Hamer, for appellant.

H. M. Sinclair, contra.

GOOD, C.

Eliza Ellis brought this action against the city of Kearney to recover for injuries sustained by falling into a hole in one of the streets of said city. A demurrer *ore tenus* was sustained, and judgment rendered for the defendant in the court below. The plaintiff appeals to this court.

The defense relied upon by the defendant was that no notice in writing of the accident or injury complained of was given, as required by section 39, art. III, ch. 13, Comp. St. 1907. Kearney is a city of the second class having more than 5,000 and less than 25,000 inhabitants,

Ellis v. City of Kearney.

and section 39, above referred to, is applicable to cities of that class. Said section is as follows: "No city shall be liable for damages arising from defective streets, alleys, sidewalks, public parks or other public places within such city, unless actual notice in writing of the accident or injury complained of, with a statement of the nature and extent thereof, and of the time when and place where the same occurred, shall be proven to have been given to the mayor or city clerk within thirty (30) days after the occurrence of such accident or injury." It will be observed that by the terms of this section cities of the class to which Kearney belongs are not liable for damages arising from defective streets or other public places within the city, unless actual notice in writing of the accident or injury complained of, with a statement of the nature and extent thereof, and of the time and place where the same occurred, is given to the mayor or city clerk within 30 days after the occurrence of the accident or injury. It is conceded that no notice in writing, as required by this statute, was given until nearly three months after the injury was sustained. The plaintiff seeks to avoid the effect of this statute by pleading that she was unconscious for nearly three months after the accident complained of, and is therefore excused from giving the notice in writing within the time prescribed. She also seeks to avoid the statute by alleging that oral notice was given to the mayor within ten days after the accident.

This case is disposed of by the case of *Schmidt v. City of Fremont*, 70 Neb. 577. It was there held: "The maxim that physical incapacity to perform a duty enjoined by law excuses nonperformance, is not available to extend the time, or afford an opportunity to fix a statutory liability upon another." It was expressly decided therein that no recovery could be had against a city of more than 5,000 and less than 25,000 inhabitants for injuries arising from a defective sidewalk, unless the notice required by section 39, *supra*, was given within the prescribed time.

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In that case the person injured was a boy ten years of age. The notice in writing was not given until the thirty-seventh day after the accident. It was held that no recovery could be had. See, also, *Srancy v. Gage County*, 64 Neb. 627.

We think the construction placed upon this statute in that case is conclusive of the issues in the case at bar. The plaintiff asks this court to hold that the oral notice would suffice. To do so would be to nullify the statute. It is not the province of the courts to make the law, or read into it exceptions not intended by the lawmakers. It follows that the judgment of the district court is right and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

UNITED STATES SUPPLY COMPANY, APPELLEE, v. J. E.
VLASNIK ET AL., APPELLANTS.

FILED NOVEMBER 9, 1907. No. 14,927.

Appeal: JUDGMENT ON PLEADINGS. Where a general demurrer is sustained to an answer and judgment by default entered on the allegations of the petition for want of further plea by defendant, error in sustaining the demurrer should be held to be without prejudice, if, on the pleadings as they stood with the answer on file, plaintiff was entitled to judgment for a sum not less than that for which judgment was taken.

APPEAL from the district court for Knox county: JOHN F. BOYD, JUDGE. *Affirmed.*

Isaac Powers, H. F. Barnhart and E. A. Houston, for appellants.

W. A. Meserve, contra.

JACKSON, C.

The plaintiff's action is on an account for goods sold and delivered at an agreed price of \$925.70, upon which the defendants are credited with \$794.55, leaving a remainder of \$131.15, for which sum, with interest, the plaintiff asked judgment. An itemized statement was attached to the petition, and is as follows:

"725 ft. 8" Blk. Std. Wrt. I. Pipe. 61x2½
2 8" Ludlow I. B. Br. Mtl. Gates 50x5
1 8" 45 O. C. I. Flanged Ell Drilled
2 8" Flanges Drilled to fit do.
1 8" Long sweep Ell.
20 ft. 6" Blk. pipe perforated ¾x6"
slots 5 to circumference of tip
2" between rows, beak joint.
2½ ft. ½ Rainbow Pack
1 18" Trimo Wrench."

The answer was, first, a general denial, and, second, an allegation that "on or about the 9th day of July, 1903, the plaintiff, through its salesman and duly authorized agent, sold the defendants herein 725 feet of 8" black standard wrought-iron pipe, which 8" black standard wrought-iron pipe weighed 28.18 pounds a foot, and the same was purchased at the stipulated sum of \$789.36; that thereafter, contrary to and in violation of said order, contract and agreement between the defendants and said agent acting for and on behalf of the plaintiff, the plaintiff shipped to the defendants at Niobrara, Nebraska, 725 feet of well casing, weighing less than 28.18 pounds a foot, and not more than 24 pounds a foot, and pipe of a cheap and inferior grade, instead of 8" black standard iron pipe, as provided for in said order and contract and agreement aforesaid, and that the well pipe so shipped to defendants was of the market value of \$658.21, and no more; that the defendants did not discover the grade of said well pipe, nor that the same was only 24 pounds and less than 28 and a fraction pounds a foot, and was not 8" black standard

wrought-iron pipe, until too late to countermand said order, and not until after the same was delivered to the defendants, but, notwithstanding the violation of said order and agreement, the defendants, soon after receiving said merchandise, paid the plaintiff the sum of \$658.21, the full market price and value of the casing so shipped, and the defendants are not now indebted to the plaintiff in the sum of \$131.45, or in any sum or amount whatsoever." The trial court sustained a general demurrer to the answer, and the defendants declining to plead further, the plaintiff had judgment by default on April 24, 1906, for the sum of \$152.90, from which the defendants appeal.

The trial court may have erred in sustaining a general demurrer to the answer, which put in issue the purchase of the articles contained in the itemized statement other than the pipe there described, but, as we view the case, it was error without prejudice. It appears from the answer of the defendants that they contracted to purchase of the plaintiff 725 feet of iron pipe at an agreed consideration of \$789.36, and that, after discovering the fact that the pipe was not of the quality agreed upon, they retained it without complaint, and paid \$658.21 of the purchase price. If the pipe was not of the kind and quality ordered, the defendants should have refused to receive or retain it, but, having accepted it with the knowledge of its quality, they are bound for the contract price. *Roman v. Bressler*, 32 Neb. 240; *Hazen v. Wilhelmie*, 68 Neb. 79. The plaintiff therefore could have taken judgment on the pleadings for the difference between the contract price and the amount paid, which is the sum of \$131.15. This, it will be noticed, is the exact sum for which the plaintiff prayed judgment, and with interest computed at the lawful rate from the date when the account would commence to draw interest is somewhat more than the amount for which the plaintiff actually took judgment.

It is insisted, however, by defendants that in no event

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was the plaintiff entitled to judgment by default. They appeal to section 134 of the code, relating to proof of allegations of value, but there is no question of value involved; it is one of contract price, concerning which there is no dispute.

It follows that the judgment of the district court should be affirmed.

AMES and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARY JACOBSEN, APPELLEE, v. CITY OF OMAHA, APPELLANT.

FILED NOVEMBER 9, 1907. No. 14,957.

1. **Cities: INJURY: NOTICE.** A statutory notice is not rendered void by the inclusion of surplusage which has not misled the party notified to his prejudice.
2. **Appeal: EVIDENCE.** Incompetent testimony concerning a matter about which there is no dispute is not ground for reversal.
3. **Cities: WALKS: ABANDONMENT.** In the circumstances of this case there appears to have been no abandonment or vacation of a pathway for pedestrians along which the city had previously constructed and maintained a sidewalk.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

H. E. Burnam, I. J. Dunn and J. A. Rine, for appellant.

W. H. De France, contra.

AMES, C.

Along a certain portion of the south side of St. Mary's avenue, near its intersection with Jackson street, in the city of Omaha, the city had, until some time in 1898, maintained a wooden sidewalk between these two streets

and Nineteenth street. There was at this place a triangular tract of ground, which the city bought in the year named and devoted to street purposes, and the tract thus became a junction place for the three streets; the sidewalk space thus became the hypotenuse of a right angle triangle, of which the outer boundaries of Jackson street and Nineteenth street were the other two sides. Immediately after the purchase, the city caused the tract, including the sidewalk strip mentioned, to be paved with wooden blocks set upon a concrete bed or base, thus adapting the whole to vehicular traffic, but it did not then or thereafter take any official or formal action purporting to be a vacation or abandonment of the strip as a public way or sidewalk for foot passengers, and the public have continuously used it as such from thenceforward, although there were properly maintained sidewalks on Jackson and Nineteenth streets, along the other two sides of the triangle. After a short time the wooden blocks rotted away, and the surface of the concrete bed became worn and uneven with holes and protuberances, so that the same was, and was permitted to remain, an unsafe passageway for pedestrians. After this state of affairs had existed for some time, and while it continued, the plaintiff, in the day time, and with the exercise of care and caution, having in view the dangers of her situation, attempted to walk along this strip from St. Mary's avenue to Jackson street, which was covered with a light blanket of snow, then falling, when she slipped or stumbled on one of the protuberances and fell to the ground, suffering personal injuries, to recover damages for which this action was brought. There was a verdict and judgment for the plaintiff, from which the defendant appealed.

So far as we can understand from the briefs of counsel, there is no substantial dispute about the foregoing facts, and we think they are established without contradiction and are all that require to be considered on this hearing. There are four alleged errors urged by counsel for appellant in his brief. One of them is to this effect: A statute

provided that such an action should not be maintained, unless within a specified time after the accident there should have been served upon the city a written notice of the injury, and of the nature and extent thereof, and of the time when and place where it had occurred. A notice was served in due time, which recited all that the statute required, but proceeded to state, as a cause of the accident, that the sidewalk was negligently and defectively constructed and maintained, and ice and snow had been permitted to accumulate thereon. This additional matter was irrelevant to the requirement of the statute and so mere surplusage, of which the city may not complain, unless it was misled thereby to its prejudice, and the record does not show it to have been so. All that counsel complains of is that it might have done so, which is perhaps true, but there is no present practical occasion for speculating about it. The petition charges that the defendant "negligently failed to construct or maintain a sidewalk or safe way for foot travel along and in front of said triangular tract of ground and in St. Mary's avenue, which failure covered a period of about four years." This allegation informed the defendant of the exact nature of the wrong complained of, which, as we have said, was proved without substantial, if any, contradiction. We do not think it a detraction from the sufficiency of the pleading or proof that the city had, until four years previously maintained a sidewalk along the strip mentioned. We do not think it a case involving the question whether the city is compelled to construct and maintain a walk upon a pathway voluntarily chosen by pedestrians, but which is not and has never been set apart for such use by the city. This pathway had been so set apart and been so used until the space was paved with wooden blocks, and such pavement, as long as it was kept in repair, doubtless served well enough the purposes of pedestrians so that the pavement itself did not operate to withdraw it from such use or to warn foot passengers that it had been abandoned therefor, which in fact it had not been.

Another contention is, that the plaintiff was guilty of contributory negligence in continuing to pursue the way after she discovered its dangerous condition, but the danger was not so great or so imminent as to render such use negligence *per se*. The plaintiff testified that she employed such care and circumspection after she discovered the condition of the way, which she did not do until after she had entered upon it, as prudence and care for her own safety seemed to require. The question was one for the jury, which they have answered in her favor, and we think the evidence in that regard supports their verdict.

Finally, it is objected that the court permitted a witness to testify that the condition of the pathway, several months after the happening of the accident, was rough and uneven. If there had been any substantial conflict as to its having been in that condition at the time of the accident, the objection would, perhaps, be well taken, but we think the matter is clearly beyond dispute, so that the error, if any, was without prejudice.

We do not discover that the court failed to submit the issues fairly to the jury or committed any other prejudicial error, and we recommend that the judgment be affirmed.

CALKINS, C., concurs.

FAWCETT, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

Fitch v. Martin.

F. W. FITCH, APPELLANT, v. EUCLID MARTIN, ADMINISTRATOR, APPELLEE.

FILED NOVEMBER 9, 1907. No. 15,211.

Trial: FRAUD: DISMISSAL. Fraud or imposition upon the court and against defendant, practiced by a plaintiff during the progress of the trial of his cause, does not justify the dismissal of his action without a determination of its merits.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Judgment of dismissal vacated and cause remanded with directions.*

A. S. Churchill and Byron G. Burbank, for appellant.

F. H. Gaines and E. G. McGilton, contra.

AMES, C.

This is an appeal to the district court from a judgment of a county court disallowing a claim against the estate of a deceased person. After the trial had proceeded so far that the cause had been submitted to the jury for deliberation upon their verdict, the claimant or plaintiff was accused of having secretly and fraudulently made a material alteration in an alleged book of accounts of transactions between himself and the deceased, after it had been offered and received as documentary evidence in the progress of the trial. The trial judge thereupon, with the aid of a committee of lawyers appointed by himself, made an investigation into the subject of the charge, as a result of which he became convinced, and made a determination or finding, that the accusation was true. In consequence of such finding, and of his own motion, as the record recites, the judge discharged the jury from further consideration of the case and entered a judgment dismissing the appeal. A motion to vacate the dismissal and for a new trial having been **overruled**, the plaintiff appealed to this court.

The constitution of this state contains the three following provisions: Article I, sec. 13. "All courts shall be open, and every person, for any injury done him in his hands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without delay."

Article I, sec. 24. "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied."

Article VI, sec. 17. "Appeals to the district courts from the judgments of county courts shall be allowed in all criminal cases on application of the defendant; and in all civil cases, on application of either party, and in such other cases as may be provided by the law."

It is nowhere provided that the rights thus guaranteed shall be forfeited by deceit or imposition practiced upon the court, or attempted so to be, or even by the commission of forgery, perjury or other criminal offense. Such penalties as the statute does or shall provide for any such acts must, we suppose, be inflicted, if at all, after trial and conviction by due course and process of law, and not as the result of a summary investigation in a proceeding unknown to the statute and instituted by the judge upon his own motion. The proceeding and judgment are attempted to be justified in this instance as being an exercise of the inherent powers of the court to protect itself from the consequences of deceit and imposition, and to prevent its ordinary process and proceedings from being made use of as the instruments of fraud or oppression. It is unnecessary to attempt to decide, at present, what are the nature and limitations of the powers of the court in this respect, but we think it is safe to say that they do not extend so far as entirely and finally to deprive a litigant of the right to have his suit heard, tried and determined according to the usual course and practice of the courts in similar cases.

Counsel cite but one decision in support of their contention, viz., *Gage County v. King Bridge Co.*, 58 Neb.

827. But we think that decision is not conclusive, or, indeed, in point, in the present controversy. The appeal, which was dismissed in that case, was from an order of a county board allowing a claim against their county. Now, a taxpayer has no natural or constitutional right to prosecute such an appeal, which concerns a matter in which he has no special individual or personal interest, but the statute permits him to carry on the proceeding in the name and behalf and as a representative of the public, that is to say, of the whole body of the county. And when, in the case cited, the court discovered that the appellants were not in fact doing what the statute contemplated, and that they were not in reality prosecuting the appeal in the interests of or as representatives of the public, but for the accomplishment of unlawful and extortionate ends of their own, it refused to permit them to proceed further. By so doing the court bereft the appellants of no right or property, but at the uttermost deprived them of a privilege which has been conferred upon them, not for their own end alone, but for the public benefit, from which end they had perverted it.

The cases cited in *Gage County v. King Bridge Co.*, *supra*, appear to us to be in point neither in that case nor in this. The appeal in *Johnson v. St. Paul City R. Co.*, 68 Minn. 408, was dismissed because it was without merit, that is to say, because the judgment sought to be appealed from was entered in obedience to a mandate from the supreme court and was consequently not subject to review. The court properly described the appeal as frivolous. In *Stewart v. Butler*, 59 N. Y. Supp. 573, the New York supreme court at special term, that is to say, a trial judge, entered an order staying a suit at law under such circumstances, as the opinion recites, as would have justified or probably induced a court of equity perpetually to enjoin the prosecution of a multiplicity of vexatious suits at law. What afterwards became of this case we do not know, nor have we an accurate knowledge of the powers or jurisdiction of the New York courts or of their methods

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of procedure, but it is evident that there was exerted in that case a power or jurisdiction quite different in both its nature and origin from that exercised by either of the Nebraska courts in the cases under consideration. We think none of the cases mentioned is a precedent for the order of dismissal in the case at bar, which we think to be also without justification by principle. We, of course, intend to intimate no opinion with respect to the truth or falsehood of the accusation against the plaintiff.

Much of the briefs and oral arguments of counsel was concerned with orders made by the trial judge with reference to the withdrawal and amendment of pleadings. These orders are, however, interlocutory, and subject to vacation or modification during the future progress of the cause. Whether they, or any of them, are erroneous, we do not think it necessary or prudent to express an opinion until there shall have been presented a record containing a judgment within the jurisdiction of the district court to render. Even error thus committed may be cured by other steps in the procedure, and may finally turn out to be without prejudice.

We recommend that the judgment of dismissal be vacated and set aside, and the cause remanded, with instructions to reinstate the cause and proceed with it according to law.

CALKINS, C., concurs.

FAWCETT, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of dismissal is vacated and set aside, and the cause remanded, with instructions to reinstate the cause and proceed with it according to law.

JUDGMENT ACCORDINGLY.

L. P. ALBRIGHT, APPELLANT, v. STATE LIFE INSURANCE
COMPANY, APPELLEE.

FILED NOVEMBER 9, 1907. No. 14,959.

Insurance: CONTRACT: PAROL EVIDENCE. Where, in a written application for life insurance, the applicant agrees that no statements, promises or information made or given by the person soliciting or taking such application shall be binding on the company, unless embodied in the application and presented to the company at its home office as a part thereof, the applicant cannot show that such application was conditioned upon an agreement not contained therein, made by the agent soliciting the application, that the company was to make a real estate loan for the amount of the policy.

APPEAL from the district court for Webster county: Ed
L. ADAMS, JUDGE. *Affirmed.*

L. H. Blackledge and J. S. Gilham, for appellant.

Crane & Boucher and Fred Maurer, contra.

CALKINS, C.

On the 10th day of September, 1903, one J. W. Howard, who was a soliciting agent for the defendant, a life insurance company, and authorized to take applications for life insurance policies and collect the first premium therefor, orally represented to the plaintiff that the defendant would make him a \$4,000 loan if he would take out a \$4,000 policy, to be secured by a mortgage at the rate of 5 per cent. Howard was provided by the defendant with blank applications and receipts for the first year's premium, but it does not appear that he had authority to solicit for loans or that he was provided with any forms issued by the defendant for that purpose. The plaintiff thereupon signed an application for a policy of life insurance in the sum of \$4,000, and executed his note payable to "J. W. Howard, agent," March 1, 1904, in the sum of \$236.92, the amount of the first annual premium. The

application contained the provision: "I agree that no statements, promises or information made or given by the person soliciting or taking this application shall be binding on the company, unless such statements, promises or information be reduced to writing and presented to the officers of the company at the home office with this application, and that this application and the policy hereby applied for, taken together, shall constitute the entire contract between the parties hereto." Howard thereupon took one of the ordinary receipts of the defendant, which, as printed, acknowledged the receipt of the first annual premium and provided that the insurance would be in force from the date of the approval of the application by the medical director, and that, in case the policy should not be issued, the money paid would be refunded, and inserted therein: "Received of L. P. Albright note for \$236 in favor of J. W. Howard, agent; this note not to be negotiated nor collected until policy is issued and \$4,000 loan has been made to the applicant." The plaintiff made upon a blank form in ordinary use an application for a loan, which was delivered with the application for insurance to the agent Howard. What became of the application for a loan does not appear, but the application for the insurance was in due course received by the defendant.

The next transaction appearing in the record is a letter from the president of the defendant company, dated December 11, 1903, and addressed to the plaintiff, as follows: "Replying to your letter of December 8, in which you say you gave an agent of ours, whose name you do not mention, an application for a policy of \$4,000, conditioned that the home office would loan you \$4,000 at 5 per cent. on real estate in your city by March 1, next, was duly received. None of our agents has authority to make any such contract for loans, and we would not accept a loan under any such conditions. Our loan department and insurance department are run entirely separate, and if you

were to take \$100,000 of life insurance it would not influence us at all in making you a loan, except such as could be made on your policy at the proper time. I am glad you wrote me about this matter before complications could arise. I wish you would send me the name of the agent. Yours truly, A. M. Sweeney, President." After receiving this letter the plaintiff, on December 23, 1903, appeared before the medical examiner of the company at Red Cloud, Nebraska, to whom his application had been returned, and submitted to a medical examination, signing that portion of the application relating to his family history. The report of the examiner being satisfactory, the application was accepted by the company and a policy of insurance was issued on January 13, 1904, and sent to the plaintiff by mail. This policy the plaintiff returned to the company, but without letter or explanation, and when the company requested such explanation he wrote on the back of its letter, dated March 30, 1904: "I return herewith policy. Your agent has bound you by contract which must be carried out before I accept policy." Meanwhile the note had passed into the hands of the First National Bank of Omaha, and the plaintiff was compelled to pay the same. It does not appear who received the proceeds of the note, but it bears the indorsement in blank of J. W. Howard, agent, and George J. Crane, who was the state agent of the defendant. After the payment by the plaintiff of the note in question, in February, 1905, he brought this action to recover from the defendant the amount which he was required to pay thereon, on the ground that the defendant had failed to fulfil the contract or return the note given by him. The issues being made up upon this plea, there was a trial to a jury, and, the plaintiff having given testimony tending to establish the foregoing facts, the court at the conclusion thereof directed a verdict for the defendant; and the plaintiff brings this appeal from the judgment rendered upon such verdict.

It is not claimed that the soliciting agent, Howard, had any actual authority from the defendant to make any

agreement for the loan of money upon the security of real estate, and the power of soliciting applications for life insurance clothed him with no apparent authority to make such contracts, or to condition contracts for life insurance upon the making of loans. The application which the plaintiff signed, and which alone appears to have come to the defendant's notice, was complete in itself and contained no stipulation respecting any loan to be made to the plaintiff upon real estate security. In it the plaintiff agreed that no statements, promises or information made or given by the person soliciting or taking the application should be binding on the company, unless the same should be reduced to writing and presented to the defendant at the home office as a part of such application. It is not suggested why this was not a reasonable and just provision and one which should be enforced by the court. The agreement to make a loan of its funds upon real estate security is not germane to the contract of life insurance, and the two branches of business should be, and by all reputable companies are, kept entirely separate. A life insurance company is a trustee for its policy holders, and for it to promise real estate loans to induce applications for its policies would be an unfaithful exercise of its stewardship. After being informed by the defendant that no agent had authority to make any such contract, and that the defendant would not make a loan under any such conditions, the plaintiff presented himself for medical examination and signed the certificate as to his family history indorsed upon his original application, and it might well be held that, the defendant having thereupon issued its policy of insurance and placed itself under the liability thereby created, the plaintiff would be estopped to claim that the contract contained any other stipulation or condition than that embodied in the application and policy. But it is not necessary to determine that question, as the stipulations in the application excluded any other condition or agreement. The plaintiff relies on the cases of *New York Life Ins. Co. v. Baese*, 31 S. W. (Tex. Civ.

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App.) 824, and *New York Life Ins. Co. v. Rohrbough & Co.*, 2 Willson, Civ. Cas. Ct. App. (Tex.) 167. Neither of these cases is in point. In the first the company did not issue the policy, and in the second it does not appear that a written application was made, though it seems that the company knew that the solicitor had promised to issue a policy conditioned that the insured might travel without restriction, and it refused to issue a policy in that form.

We therefore recommend that the judgment of the court below be affirmed.

AMES, C., concurs.

FAWCETT, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the court below is

AFFIRMED.

ROY L. STEWART, APPELLEE, v. CHARLES E. WALKER ET
AL., APPELLANTS.

FILED NOVEMBER 9, 1907. No. 14,964.

1. **Mortgages: REFORMATION: SUBSEQUENT PURCHASER.** Where a mortgage purports to give the amount, date of execution and maturity, and the rate of interest borne by the notes it secures, and is so recorded, the mortgagee may not in a suit against a subsequent purchaser of the premises, who has no notice except such as is afforded by the record, show that the notes intended to be secured matured at an earlier date or bore a higher rate of interest than was specified in the mortgage.
2. ———: **ESTOPPEL.** The statements contained in a mortgage recorded by the mortgagee are his declarations to all subsequent purchasers, and he is estopped, as against one who has bought the premises relying upon such record, to assert that his interest is greater or his lien more onerous than was described in such mortgage.
3. ———: **MISTAKE: EQUITY.** If a mortgagee accepts and records a mortgage which describes the notes it secures as maturing at a later date or bearing a lower rate of interest than is actually

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named in such notes, the mistake is his, and under the rule that, where one of two innocent persons must suffer, the one who has made a mistake possible is the one who must bear the loss, the mortgagee must suffer the consequences of such error, rather than the innocent purchaser who has relied upon the record.

4. **Vendor and Purchaser: RECORDS: EXAMINATION BY AGENT.** It is not necessary for a purchaser of real estate to personally inspect the public records. He may do this by his agent or attorney; and a person who prepares an abstract of title from the record for his examination is the agent of such purchaser.

APPEAL from the district court for Johnson county:
JOHN B. RAPEB, JUDGE. *Reversed and dismissed.*

S. P. Davidson and C. H. Epperson, for appellants.

L. C. Chapman, W. E. Stewart and S. S. Stewart, contra.

CALKINS, C.

On the 5th day of May, 1905, the defendants' grantor executed a mortgage to plaintiff's assignor, which contained the condition that the same should be void upon the payment of the sum of "\$2,633.33, with interest thereon at the rate of 6 per cent. per annum according to the tenor and effect of seven promissory notes of even date herewith, one for the sum of \$166.66; one for the sum of \$166.66; one for the sum of \$333.34; one for the sum of \$333.34; one for the sum of \$333.34; one for the sum of \$333.34, and one for the sum of \$1,270, due in 1, 2, 3, 4 and 9 years, respectively." This mortgage was duly recorded on the 6th day of May, 1905, and on the 1st day of August, in the same year, the mortgagee executed a written assignment thereof, purporting to transfer the same and the notes therein described to the plaintiff, which assignment was duly recorded on the day of its execution. The notes which the mortgage was really given to secure were dated on the 4th day of April, 1905, and were due, two on the 1st day of March, 1906, one on the 1st day of March, 1907, one on the 1st day of March, 1908, one on the 1st day of March, 1909, and one on March 1, 1913. The

principal of these notes was the same as described in the mortgage, and they each bore interest at the rate specified in the mortgage, except one of the \$166.66 notes, which was drawn to bear interest at the rate of 8 per cent. per annum. The mortgagor on the 7th day of August, 1905, conveyed the premises by a deed without covenants to one Neilson, who on the 23d day of January, 1906, by a similar deed conveyed the premises to the defendant Furer, who took the title with no other notice of the date, amount, date of maturity and rate of interest of the debt secured than that afforded by the record of the mortgage and its assignment. On the 16th day of March, 1906, the plaintiff commenced suit to foreclose the mortgage, alleging that the notes were actually dated April 5, 1905, and became due on the 1st day of March, instead of the 1st day of May, as specified in the mortgage, and that the misdescription thereof in the mortgage resulted from an error of the scrivener who drew the same. He prayed for a reformation of the mortgage and a decree of foreclosure and sale for the amount of the entire debt, which was rendered by the district court, from which judgment the defendant Belle Furer brings this appeal.

1. The principal question in this case is whether, where a mortgage purports to give the amount, date of execution and maturity, and the rate of interest borne by the notes it secures, and is so recorded, the mortgagee may, in a suit against a subsequent purchaser of the premises who has no notice except such as is afforded by the record, show that the notes intended to be secured were dated and matured at an earlier day, and bore a higher rate of interest than was specified in the recorded mortgage, and have the same enforced accordingly. Whatever the rule may be in reference to mortgages which do not purport to give these particulars, we are satisfied that, where the mortgage states the amount, date of maturity, and rate of interest borne by the notes secured thereby, it may not, as against a purchaser without notice, be reformed in any particular which makes the burden of the lien more oner-

ous than it appeared to be from the recorded mortgage. The only rational interpretation of the recording act is that the real mortgage must be recorded, and the very fact that the plaintiff asks to have the mortgage reformed is a confession that the mortgage which he is seeking to enforce was never recorded, and is therefore void as against subsequent purchasers without notice. In the earlier cases a tendency appears to hold the mortgage invalid, unless it truly describes the debt to be secured; but the modern and better doctrine seems to be that, if there is a real debt to be secured, it may be enforced as against a subsequent purchaser, if the amount be no larger than is indicated by the mortgage and the conditions no more onerous. We are cited to cases which hold that a debt may be enforced although less in amount than that specified in the mortgage, to cases which hold the mortgage valid where no amount is specified, and to cases where a mortgage is held good which secures a contingent liability; but no case has been brought to our attention which conflicts with the rule above laid down, unless it be the case of *Hinricks v. Brady*, 20 S. Dak. 599, where it was held that a purchaser of the premises was bound by the provisions of the notes that they should draw increased interest after maturity, and that overdue interest payments should also draw increased interest, although this provision was not mentioned in the mortgage. This case appears to have been decided on the authority of *Ricketson v. Richardson*, 19 Cal. 330, where it was held that, when a mortgage mentioned interest without naming the rate, subsequent purchasers were liable for the principal and the conventional interest stipulated in the notes. The opinion expressly concedes the rule that, where a note is described in a mortgage as it is made or recorded as a note for a given sum, the mortgagee cannot set up as against a subsequent purchaser a different and larger debt, for the plain reason that a party dealing with or in respect to the property from an inspection of the mortgage contracts in reference to its terms, and cannot

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be supposed to know or suspect that the real fact is different from the recorded account of it. The court there held that there was no intendment under the laws of California that, when interest is the subject of stipulation, no particular rate is agreed on, and, there being no rate specified in the mortgage, that the conventional rate obtained. We are inclined to the view that, where no rate is specified, the legal rate would prevail in this state, but it is not necessary to determine that, for in *Ricketson v. Richardson*, *supra*, no rate is specified, while in *Hinricks v. Brady*, *supra*, a rate was specified with no intimation that it was to be changed after due. The latter case, while professedly resting upon the authority of the former, went one step further.

2. The purpose of recording a mortgage is to give notice of the lien to subsequent purchasers and incumbrancers. It was said by MAXWELL, J., in *Edminster v. Higgins*, 6 Neb. 265: "The policy of our law is to discourage secret liens, and to require all instruments affecting the title of real estate to be entered of record"; and that "the law thus places a means within the reach of every one desiring to purchase real estate of ascertaining the condition of its title." The mortgagee receiving a mortgage and recording the same in pursuance of the statute is responsible for the statements therein contained respecting the nature and extent of his lien. The declarations contained in the mortgage are his declarations to all subsequent purchasers, and, under a familiar rule of equity jurisprudence, he is estopped to assert against subsequent purchasers that his interest is greater than he declared it to be by the statements contained in the mortgage which he himself caused to be recorded for the very purpose of notifying such subsequent purchasers of the existence and extent of his lien. It is suggested that the intending purchaser should inquire of the mortgagee concerning the lien. Conceding, for the argument, that this is true in respect to those matters not covered by the mortgage, why should the intending purchaser interrogate the mortgagee con-

cerning those matters which the mortgagee has already formally declared and caused to be entered in the record? If the mortgage declares, as in this instance, that the notes bear even date therewith and are due at specified periods from such date, and that they bear interest at the rate of 6 per cent. per annum, there is no reason why the intending purchaser should be required to go to the mortgagee to ascertain if the facts stated in the mortgage, which he caused to be recorded for the purpose of giving notice, are true.

3. The construction of the recording act contended for by the plaintiff contravenes the well-settled principle of equity jurisprudence that, where one of two innocent persons must suffer from the consequences of a mistake, the person who made the mistake possible is the one who must bear them. It was the fault of the mortgagee if the mortgage which he took did not correctly describe the notes it was intended to secure, and if there is to be a loss in consequence of that mistake he should bear it, and should not be allowed to shift the burden upon the innocent purchaser.

4. The plaintiff contends that the defendant did not rely upon the record, because she did not personally examine the same. It appears that her husband, who acted for her, procured an abstract of the record which correctly exhibited the facts recited in the mortgage as to the debt it secured. It is conclusively presumed against a purchaser that he had notice of the facts stated in the record, and there is no reason suggested why the presumption should not obtain in his favor as well; but if it is necessary for a purchaser to examine the record he may do it by an agent, and that is what happens when he relies upon an abstract made from the record. There is no merit in this contention.

We therefore recommend that the judgment of the district court be reversed and the plaintiff's action dismissed.

AMES, C., concurs.

FAWCETT, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the plaintiff's action dismissed.

REVERSED.

ERWIN O. BODE V. STATE OF NEBRASKA.

FILED NOVEMBER 21, 1907. No. 14,951.

1. **Embezzlement: INFORMATION.** In a prosecution for embezzlement under section 124 of the criminal code, it is not necessary to allege in the information that the city whose funds are embezzled is an organized city.
2. ———: ———. Information examined, its substance stated, and *held* not vulnerable to the objection that "It fails to allege that the accused embezzled and converted the public money in question while holding it as city treasurer."
3. **Criminal Law: INSTRUCTIONS.** Instructions must be considered and construed together, and if then they correctly announce the rule applicable to the issues and evidence they will be upheld, even though a single paragraph standing alone might be faulty.
4. ———: **EVIDENCE.** In a prosecution for embezzlement, or other crime, where the books, records, papers and entries are voluminous and of such a character as to render it difficult for the jury to arrive at a correct conclusion as to amounts, an expert accountant may be allowed to examine such books, etc., and testify as to the result of his examination, and as to particular entries therein, shown to be in the handwriting of the defendant, when such books are in the courtroom subject to inspection by the accused, and the particular entries are also introduced in evidence.
5. ———: **ADMISSIONS.** Voluntary admissions or confessions of the accused tending to establish his guilt may usually be received in evidence against him, and the fact that such admissions contain statements tending also to show the commission of an offense other than the one for which the defendant is on trial does not render them inadmissible.
6. Evidence examined, and *held* sufficient to sustain the verdict.

ERROR to the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Affirmed.*

F. Martin and E. Ferneau, for plaintiff in error.

W. T. Thompson, Attorney General, Grant G. Martin and R. C. James, contra.

BARNES, J.

Erwin O. Bode was prosecuted for the crime of embezzlement as defined by section 124 of the criminal code. His trial resulted in a conviction, and from the judgment and sentence of the district court he brings the case here for review.

The defendant's first contention is, in substance, that the information on which he was tried is fatally defective, in that it fails to charge that the money in question belonged to an organized city. There is no merit in this contention. The use of the word "organized" in the statute qualifies the word "city" and is mere surplusage, since a city must be organized in order to be a city, a distinct entity, capable of owning property susceptible of embezzlement. Again, where a city is organized by special legislative act, the courts will take judicial knowledge of such organization. In *People v. Potter*, 35 Cal. 110, which was a prosecution for embezzlement, it was said: "A legislative act by which a city is incorporated is a public act of which courts are bound to take judicial notice." The city of Falls City was organized by a special act of the legislature of the then territory of Nebraska, which was approved February 12, 1867, and has ever since said date been exercising the powers and duties of an organized city of its class. This being true, the information which charges that the money in question belonged to the city of Falls City, Nebraska, in effect alleges that it was the money of an organized city. Section 412 of the criminal code provides: "No indictment shall be deemed invalid * * * for want of the averment of any matter not necessary to be proved," and proof of the organization of the city of Falls City was unnecessary. It therefore follows

that the omission of the allegation mentioned does not affect the validity of the information.

The second objection urged against the information is that it fails to allege that the defendant embezzled and converted the money in question to his own use while holding it as city treasurer. The information alleges that the accused was the city treasurer of Falls City from September 27, 1902, to May 3, 1906, and that on or about the 2d day of May, 1906, in Richardson county, state of Nebraska, then and there being, and then and there as such officer being charged with the collection, receipt, safekeeping, transfer and disbursement of the public moneys of the said city of Falls City, the defendant did then and there fraudulently, unlawfully and feloniously convert to his own use and embezzle the sum of \$6,000 of said public money, the property of said city of Falls City, which said money had then and there come into the possession and custody of the said defendant by virtue of said office, and in the discharge of the duties thereof. So it clearly appears that the information is not open to this criticism.

Defendant's third contention is that the court erred in giving the seventh paragraph of the instructions requested by the state, which reads as follows: "The court instructs you that it is not necessary for the state to prove what has become of the city money, if you believe that any of such money has been diverted by the defendant. It is not essential for the state to show you what the defendant did with said money. It is only necessary that the state prove to you, beyond a reasonable doubt, that the defendant was the city treasurer during the time intervening between September 27, 1902, and May 2, 1906, and that, while such treasurer, money came into his possession as such city treasurer which he has not accounted for, and which he has failed and refused to turn over to the proper officer of the city at the expiration of his term of office. If you believe these facts from the evidence, beyond a reasonable doubt, then you are instructed that it makes no difference

what the defendant may have done with the money." The basis of defendant's criticism is that the court attempted to cover the whole case by this instruction, and the argument proceeds upon the theory that many elements necessary to constitute the crime charged are omitted therefrom. If defendant's criticism was true, his point would be well taken; but a reading of the whole charge clearly shows that there was no attempt to cover the entire law of the case by this instruction. The purpose was, as appears from the paragraph itself, to inform the jury that if they found, beyond a reasonable doubt, that the defendant had, while city treasurer of Falls City, obtained public money belonging to said city and had not accounted for it, and had failed and refused to turn it over to his successor at the expiration of his term, it was immaterial what particular use he had made of it. In other paragraphs of the instructions all of the elements of the crime with which the defendant was charged were clearly and specifically set forth. So it appears that the jury must have understood the purpose of the instruction complained of and could not have been misled thereby. Such an instruction standing alone may have been faulty, in that it was incomplete and did not cover all of the elements of the offense. Yet, when we consider it with the remainder of the charge, it could not result in any prejudice to the defendant, and the giving of it was not reversible error. *Carleton v. State*, 43 Neb. 373; *Bartley v. State*, 53 Neb. 310.

It is also contended that the court erred in giving the ninth paragraph of the instructions requested by the prosecution. Practically the same objections are made to this request that were urged against the one just quoted. What we have said as to the giving of that instruction disposes of this contention, and it will receive no further consideration.

It is further claimed that the court erred in permitting the witness Wiggins to testify to the contents of the books of the city treasurer's office; to single items therein, and

to his conclusions therefrom. An examination of the bill of exceptions convinces us that this objection is without merit. Wiggins was a qualified expert accountant, and as such made an examination of the city treasurer's books which the defendant kept during his term of office, and turned over to the witness for that purpose. He testified as to the result of his investigation, and, when he was questioned about particular entries, and objection was made, the entries themselves were put in evidence. His examination was conducted and his evidence was given along the lines approved in *Bee Publishing Co. v. World Publishing Co.*, 62 Neb. 732, and *Mendel v. Boyd*, 71 Neb. 657. The same may be said generally of the evidence of the witness Holland, of which complaint is also made. It is further claimed, however, that the evidence of Holland and one Jussen was prejudicial, because it appeared that they were liable on the defendant's official bond. The record shows that, when that matter was sought to be inquired into, the court excluded the evidence, and Jussen was only permitted to testify to what occurred in the presence of the accused and his own voluntary statements as to what use he had made of the city's money. Usually defendants' own admissions and confessions are competent evidence against him; so that we find no error in receiving the evidence complained of.

By his supplemental brief the defendant contends that the court erred in permitting the witness Holland to testify that the defendant told him he had paid certain school district warrants, and had afterwards sold them and placed the money thus obtained to the credit of E. O. Bode & Son. It is argued that this was evidence of a distinct crime other than the one for which the defendant was being tried. We do not think this contention is tenable. Holland testified to a certain conversation between himself, one Jussen and the defendant, and the statement of which complaint is now made was a part of that conversation. It is difficult to see how the statement objected to could have been eliminated and the remainder of the ad-

mission or confession of the defendant introduced in evidence. His whole statement related to his alleged defalcation, and as such was properly received.

It is further claimed that the court erred in refusing to give the ninth instruction requested by the defendant. The substance of this request was that the verbal admissions of the defendant, if any, should be viewed by the jury with great care, that "they may be evidence of very little value, depending upon the circumstances surrounding the making of the admission whether the person in speaking was understood just as he meant it, that the meaning of what was said was fully and properly understood by the person who heard it." There may be cases where an instruction of this nature would be proper and perhaps necessary, but such is not the case here. The defendant's admissions were clear, distinct and unequivocal, and it was not claimed on the trial that he had not made them in the manner and form related by the witnesses, or that they were made doubtful in meaning, or had been misunderstood. So there was no reason or necessity for the instruction, and the defendant could not have been prejudiced by the court's refusal to give it.

Finally, it is contended that the verdict is not sustained by sufficient evidence. Of this assignment it is sufficient to say that the record shows beyond a reasonable doubt that the defendant was city treasurer of Falls City, Nebraska, from the 27th day of September, 1902, to the 2d day of May, 1906; that, while acting as such officer, he received and obtained possession of the public funds, money belonging to said city, amounting to \$6,065.76, which he failed, neglected and refused to account for and turn over to his successor in office upon a proper demand therefor.

So, finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

HOSMER H. HENDEE V. STATE OF NEBRASKA.

FILED NOVEMBER 20, 1907. No. 15,130.

1. **Embezzlement: INFORMATION.** The estate of a deceased person, pending administration, is a legal entity; and, in charging a violation of section 121 of the criminal code, it is sufficient, as to the matter of ownership, to allege that the money or property embezzled belonged to such an estate.
2. ———: ———. An information based on the provisions of the section above named, which charges, in the language of the statute, that the property in question came into the possession of the defendant "by virtue or under color of his relation as an officer," is not void for duplicity, and is sufficient in that respect to sustain a conviction.
3. ———: ———. In charging the embezzlement of a certificate of deposit belonging to an estate, it is sufficient to describe the instrument as it appeared at the time it came into the possession of the accused, and subsequent indorsements, procured by him, need not be set forth in the information.
4. ———: **EVIDENCE.** Bill of exceptions examined, and evidence found sufficient to sustain the conviction.

ERROR to the district court for Saline county: LESLIE G. HURD, JUDGE. Affirmed.

Grimm & Son and A. J. Sawyer, for plaintiff in error.

W. T. Thompson, Attorney General, and Grant G. Martin, contra.

BARNES, J.

The defendant below, Hosmer H. Hendee, was convicted of the crime of embezzlement, and brings the case here for review.

The prosecution was based on an alleged violation of section 121 of the criminal code, which reads in part as follows: "If any * * * officer elected or appointed to any office of public trust in the state * * * shall embezzle or convert to his or her own use any money, property, rights in action, or other valuable security or effects whatever,

belonging to any individual, or company, or association, that shall come into his or her possession by virtue or under color of his or her relation as officer, * * * every such person so offending shall be punished in the manner provided by law for feloniously stealing property of the value of the article so embezzled, taken, or secreted, or of the value of any sum of money payable or due upon any right in action so embezzled." The information contained two counts. It was alleged in the first count, in substance, that the defendant was the duly elected, qualified, and acting county judge of Saline county, and was an officer elected to an office of public trust in the state of Nebraska; that by virtue or under color of his relation as such officer there came into his possession certain money, of the value of \$52.85, belonging to the estate of one George Smith, deceased; that he fraudulently, wilfully, unlawfully, intentionally and feloniously embezzled and converted the same to his own use. In the second count it was charged in the same form and manner that there came into the possession of the defendant one certain certificate of deposit issued by the First National Bank of Friend, Nebraska, for the sum of \$3,300, with interest thereon at the rate of 2 per cent. per annum, of the value of \$3,333, belonging to the estate of George Smith, deceased, and being the property of said estate, and that the defendant did embezzle and convert the same to his own use. It appears that a motion to quash the information and both counts thereof was filed and overruled; that the defendant demurred to both counts of said information, and his demurrer was also overruled, and these rulings are assigned as error. The demurrer fairly raises two important questions, which will be considered in the order in which they were presented.

It is first contended that the charge of ownership of the money and certificate of deposit in question, which is alleged to be in the estate of George Smith, deceased, renders the information fatally defective, in that it fails to

state facts sufficient to charge the defendant with the commission of any crime whatsoever. It is claimed that an estate of a deceased person is not an individual within the meaning of the statute above quoted, and the ownership of the money and property should have been alleged to be in the administrator of the estate. In support of this contention defendant cites *State v. Mims*, 26 Minn. 191. We find that this question did not arise and was not decided either directly or indirectly in that case. We do find, however, in *People v. Hall*, 19 Cal. 425, also cited by counsel, that the question was before the supreme court of California, and it was there said: "This was a case for altering the brand of a horse with intent to steal it. The indictment charges the property as that of an estate. This is insufficient. The charge should be of altering the brand of the animal as that of a particular individual, or that the owner of the animal was unknown. For this error the judgment must be reversed and the cause remanded." The foregoing is the opinion of the court in full, and it will be observed that no reasons are given for the holding, and no authorities cited to support it. Some of the text-books, following that case, announce the rule therein stated. Since the adoption of the code, however, the supreme court of California has disregarded that decision. In *People v. Smith*, 112 Cal. 333, 44 Pac. 663, it was alleged in the complaint, for grand larceny, that the property in question belonged to the estate of W. C. Elledge, deceased, while in the information it was alleged that it belonged to the executor and executrix of the estate. The defendant claimed a variance. The court held that there was no variance, and said: "In each the offense was described with sufficient certainty to identify the act, and the alleged ownership was in effect the same, namely, in the estate of W. C. Elledge, deceased." This decision was followed and approved in *People v. Prather*, 120 Cal. 660, 53 Pac. 259. It is but fair to say, however, that section 956 of the criminal code of California provides: "When an offense involved the commission of, or an attempt to commit, a

private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material." And, while those decisions may be said to be authorized by the section of the code above quoted, yet it was said in *People v. Leong Young*, 60 Cal. 107, which was a case of grand larceny: "The name of the owner of property stolen is not a material part of the offense charged. It is only required to identify the transaction, so that the defendant, by proper plea, may protect himself against another prosecution for the same offense." Again, in *Billings v. State*, 107 Ind. 54, it was said: "To our minds, it seems reasonable that the estate of a decedent should be regarded as an artificial person. It is the creation of law for the purpose of enabling a disposition of the assets to be properly made, and, although natural persons, as heirs, devisees, or creditors, have an interest in the property, the artificial creature is a distinct legal entity. The interest which natural persons have in it is not complete until there has been a due administration, and one who forges the name of the decedent to an instrument, purporting to be a promissory note, must be regarded as having intended to defraud the estate of the decedent and not the natural persons having diverse interests in it, since he cannot be presumed to have known who those persons were or what was the nature of their respective interests. The fraudulent intent is against the artificial person, the estate, and not the natural persons who have direct or contingent interests in it." So it would seem from the foregoing that the courts now hold that it is proper to allege ownership of property in the estate of a deceased person. The allegation of ownership was sufficient to identify the crime and advise the defendant of the charge against him. Section 412 of the criminal code provides, among other things: "No indictment shall be deemed invalid, * * * when there is sufficient matter alleged to indicate the crime or person charged; * * * nor for any other defect or imperfection which does not tend to the prejudice of the

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substantial rights of the defendant upon the merits." We are of opinion that it is sufficient in charging the embezzlement of property under the provisions of section 121 of the criminal code, belonging to the estate of a deceased person, to allege the ownership either in the estate or in the administrator of the estate, if there be one.

The second point raised by the demurrer, as well as by the motion to quash the information, is based on the allegation that the money and certificate of deposit in question came into the possession of the defendant "by virtue or under color of his relation as such officer, to wit, the county judge of Saline county, Nebraska." It is contended that both counts of the information are duplicitous, and are too vague and indefinite to apprise the defendant of the crime with which he is sought to be charged. The reason for the rule invoked by the defendant is that in case of an acquittal or conviction the judgment may be pleaded in bar to another prosecution based on the same facts. To charge the commission of an offense in the disjunctive form has always been condemned by the rules of criminal pleading and by the courts, and it is insisted in this case that, if the information is sustained, our decision will form a precedent which will authorize the state to charge a defendant "with having stolen a horse or a cow or a sheep from the estate of John Doe, deceased, who in his lifetime was the owner of three quadrupeds." In support of this contention counsel cites *Clifford v. State*, 29 Wis. 327. In that case, the prosecution was based on a complaint which charged that the defendant did "vend, sell, deal or traffic in, and give away, for the purpose of evading the act, spirituous, ardent or intoxicating liquors or intoxicating drinks, viz., rum, gin, brandy, whiskey, ale and beer or wine," and it was held that disjunctive allegations in such cases are not allowed. It was further held that, where a statute makes it an offense to vend, sell, deal or traffic in certain liquors, the word "or," being used to connect synonymous expressions, may properly be retained, and the offense charged in the words of the statute. It

was said in the opinion: "Where a statute makes it a crime to do this or that, or the other, mentioning several things disjunctively, all of which are punished alike, it is a general rule that the whole may be charged *conjunctively* in a single count, as constituting but a single offense. * * * But *disjunctive* allegations in such cases are not allowed; the only exception being where the word 'or' is used in the sense of 'to wit,' that is, in explanation of what precedes, and making it signify the same thing. In the latter instance a complaint or indictment which adopts the words of the statute is well framed. * * * Within this exception would fall the word 'or' in the statute, and in this complaint, as used between the words 'deal' and 'traffic in,' these last words being synonymous, or meaning the same thing."

In the case at bar, the words "by virtue and under color," as applied to the expression "of his or her relation as officer," etc., may be said to mean one and the same thing, to wit, the obtaining of money or property by reason or because of such official relation. The offense with which the defendant was charged is embezzlement, and is punished in the same manner, whether he obtained possession of the money and property embezzled by virtue of his relation as an officer, or under color of such relation. The information follows the language of the statute, and is sufficient to define the offense. It also seems clear that but one crime is charged, and the defendant cannot be prosecuted again for any offense based on the facts alleged in the information and involved in this prosecution. Again, the defendant was sufficiently advised of the nature of the charge to enable him to properly prepare his defense, and, while it would have been sufficient to have alleged that he came into possession of the money and property in question under color of his relation as an officer, yet the charge as made follows the descriptive language of the statute, and such description is violative of none of the defendant's substantial rights. It would further seem that the legislature, by the adoption of section

121, intended to create the distinct and separate offense of embezzlement by an officer, elected or appointed to any office of public trust in this state, of any money or property obtained by him by reason of his relation as such officer, as distinguished from that described in section 124, which defines the offense of embezzlement by a public officer of money or property obtained under and by virtue of his office, and the facts alleged and the evidence produced upon the trial in this case bring it directly within the provisions of the former section. We are aware that the question is a difficult one, and that our holding, at first blush, may seem to trench upon the general rule contended for, yet in fact the charge contained in the information is not duplicitous, and is, in our opinion, sufficient to sustain the conviction.

The foregoing effectively disposes of the rulings on the defendant's motions to quash the information and in arrest of judgment. This brings us to the consideration of defendant's further contention that there is a fatal variance between the certificate of deposit described in the information and that instrument as introduced in evidence by the state, in this, that in the description of the instrument no indorsement was mentioned, while the certificate in evidence appears to have been indorsed by W. W. Stephens, as administrator of the estate of George Smith, deceased. The record discloses that, when the deceased departed this life, he was the owner and in possession of the certificate of deposit in question, which was payable to the order of himself; that the coroner of Saline county, who found it upon his person, took it into his custody, and delivered it unindorsed to the defendant as county judge. The defendant, having obtained possession of the instrument in that condition, retained it from that time forward, and never delivered it to the administrator or accounted for it to the estate of decedent. This was in effect a conversion of it, and the indorsement which he induced the administrator to sign was but a means of converting it into cash, or, in other words, of obtaining its

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proceeds in that form. By refusing or failing to deliver the certificate to the administrator and by withholding it from the estate, defendant was guilty of converting it to his own use, and the indorsement was not necessary to consummate the crime charged in the information. So it may be said that the indorsement, not being a part of the certificate when it was issued and when it was obtained by the defendant, was not a necessary part of the information.

Again, defendant is charged with the conversion of the certificate, not the money payable upon it, and a general description of the property thus converted by him was sufficient. The principle announced in *Hess v. State*, 5 Ohio, 5, 22 Am. Dec. 767, seems to be decisive of this matter. In that case the defendant was indicted for selling and delivering to another certain counterfeit bank notes, and for having in his possession, for the purpose of selling, two other counterfeit bank notes purporting to be of the Bank of the United States, issued by one H. Biddle, president, and one McIlvaine, cashier, and payable to order. It was urged that the bills offered to the jury varied from those described in the indictment, and one of the variances relied upon was the omission to describe, in the indictment, the indorsement on one of the notes, and the appearance of the words, "Pay to bearer, Thomas Wilson." The indictment set out the face of the note, but the indorsement was not alluded to at all. The court said: "The indorsement is no more a part of the note than the number, the figures in the margin, or the water-marks, and they need not be set out. Even in an indictment for forging a promissory note, the indorsement need not be set out, for it is no part of the note. * * * Neither shall it be required to set these things forth in an indictment for having them in possession. The variance objected to is not perceived." It was also stated on the oral argument that the certificate of deposit was valueless without the indorsement, and it was no offense to embezzle a thing without value. This contention does not merit serious

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consideration. The value of the instrument to the estate unindorsed was the amount of money payable thereon, and it was the estate that was defrauded by its conversion. We are therefore of opinion that the variance complained of was immaterial.

Finally, defendant contends that the evidence does not sustain the verdict. The record discloses, and it was practically admitted on the argument, that the coroner of Saline county took charge of the body of George Smith, deceased, in that county on or about the 14th day of January, 1905; that he found thereon \$52.85 in money, the certificate of deposit in question herein, and some other property of no particular value; that he immediately wrote a letter to the defendant as county judge of Saline county, asking his advice as to what should be done with the money and property of the deceased; that in response to the inquiry the defendant wrote a letter to him, from which we quote as follows: "This Mr. George Smith was an old resident of Saline county, and a property owner, and his estate will have to be administered upon by the county court, and whatever property he had should be under the control of the county judge, who will have to see to the administration of his estate, and, in the absence of relatives, is the only one entitled to the possession and control of the property until an administrator is appointed. No inquest being held, the matter stands just the same as if you had not been there at all, except that you are entitled to pay for your trip, and I shall allow it as part of the expenses attending his death. The other claims, whatever they may be, ought to be filed with me, and, as I have jurisdiction over all probate matters in this county, whatever you found should be turned over to me as county judge, you taking my receipt therefor. You have no right, where no inquest was held, to sell any property. I am glad you went over there, and that you took possession of the property, otherwise some one might have robbed the estate. The deceased has relatives living in England. I hope I have made this plain to you. The

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statute requires you to deliver the property to those entitled to its care and possession, and, in this instance, there being no relatives living here, the county court is the party entitled to, and whose duty it is to have possession of, the property and see that the estate is properly probated. Yours truly (Signed), Hosmer H. Hendee." On receipt of this letter the coroner called the defendant up by telephone, and made an appointment to meet him at De Witt, in said county, on the 25th of that month. It also appears that a petition for the appointment of an administrator of the estate of the deceased was filed in the county court on the 17th day of January, 1905, and on the 25th the coroner and the defendant met at De Witt, and the money and certificate of deposit were turned over to the defendant, who gave the coroner therefor the following receipt: "Jan. 25, 1905. Rec'd of L. N. Smith, \$52.85 cash; one deposit check for \$3,300; one watch and bunch of letters, etc.—the property of George Smith, deceased. Hosmer H. Hendee, County Judge." From that time forward the defendant retained possession of the money and certificate of deposit in question, and not only neglected and failed, but also refused, on demand, to turn the same over to the administrator of the estate, who was duly appointed, and qualified on the 22d day of February, following. As soon as the administrator was appointed, the defendant induced him to sign an indorsement on the back of the certificate of deposit, which he had theretofore prepared; that he thereafter obtained the money due thereon from the bank which issued it, and has never in any manner accounted for it to any one.

Basing his contention on the facts above stated, defendant says that he was not entitled to the possession of the money and certificate in question by virtue of his office as county judge; that he obtained possession wrongfully, or under a mutual mistake of law, and, his possession being wrongful, he could not be guilty of the crime of embezzlement. To support this contention he cites *Moore v. State*, 53 Neb. 831, and *State v. Bolin*, 110 Mo. 209, 19 S.

W. 650. In *Moore v. State* the prosecution was based on section 124 of the criminal code, and it was charged in the information that Moore, by virtue of his office as auditor of public accounts, was charged with the collection, safe-keeping, transfer and disbursement of the public money alleged to have been embezzled. It was found, however, that the constitution positively prohibited the auditor from collecting or receiving the money in question, that the accused was not within the class described in that section, and so the prosecution failed. We think it may be safely said of that case that the defendant obtained the money in question under color of his relation as such officer, and, if Moore had been charged with and tried for a violation of the section on which the prosecution in this case is based, we do not see how it would have been possible for him to have escaped from a just punishment for his wrongful acts. In *State v. Bolin, supra*, the defendant, a justice of the peace, was prosecuted for the embezzlement of \$200 belonging to the county school fund. It appears that a justice of the peace in Missouri has no jurisdiction to handle public school money, and no control over it by virtue of his office. Every one who dealt with him knew that he had no control of the public school money, and his office gave him no color of right to demand or take it. In this state a county judge is given exclusive jurisdiction over the matter of estates and the administration thereof, both by the constitution and the statutes. Having such jurisdiction, defendant's office gave color to his claim made to the county coroner that he had a right to the possession of the money and property in question. His office of public trust gave him the colorable pretext by which he induced the coroner to deliver it to him. Color, in law, means not the thing itself or the right to the thing, but only an appearance thereof. When the defendant demanded possession of the estate of the deceased from the coroner, he appeared to be acting officially, and professed to be so acting. Thus, by means of his relation as an officer, he obtained possession of the money and

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property, which he afterwards embezzled, and it seems clear to us that the undisputed facts of this case bring it fairly within the provisions of the section of the criminal code on which the prosecution was based.

It appearing from the record that the information was sufficient, that the defendant has had a fair and impartial trial, that the evidence fully sustains the verdict, the judgment of the district court is therefore

AFFIRMED.

JOHN P. BRIDGES V. STATE OF NEBRASKA.

FILED NOVEMBER 21, 1907. No. 15,168.

1. **Criminal Law: VERDICT.** Where the state in a criminal prosecution elects to proceed upon one of several counts contained in the information, and by the instructions of the court the jury are told, in effect, that their verdict must respond to the charge contained in that count, a verdict of guilty, as charged in the information, is sufficient.
2. **Jury: QUALIFICATIONS.** An opinion based upon newspaper reports does not afford cause for a challenge, where it is shown that such opinion will not interfere with the juror's rendering a fair and impartial verdict upon the evidence under the instructions of the court.
3. **Incest: EVIDENCE: INSTRUCTIONS.** Where, in a prosecution of one charged with the crime of incest, the court instructs the jury that they should not convict the defendant on the uncorroborated evidence of the prosecutrix, it is proper to conclude the instruction with the words: "This does not necessarily mean that it must be corroborated by an eye-witness to the particular act of intercourse, but it is necessary that she should be corroborated as to the material facts and circumstances, which tend to support her testimony, and which tend to establish or corroborate the truth thereof, and such corroboration can be by either direct testimony or by circumstantial evidence."
4. **Criminal Law: INSTRUCTIONS.** Where an instruction tendered by the defendant contains a statement not warranted by the evidence, it is not error for the court to modify the instruction by striking out such unwarranted statement, and give it as thus modified.

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5. **Incest: ACCOMPLICES.** A girl less than 16 years of age, who under physical and moral coercion has maintained incestuous relations with her father, is not an accomplice in crime.
6. **Evidence contained in the bill of exceptions found sufficient to sustain the verdict.**

ERROR to the district court for Otoe county: PAUL JESSEN, JUDGE. *Affirmed.*

C. W. Seymour and John C. Watson, for plaintiff in error.

W. T. Thompson, Attorney General, and Grant G. Martin, contra.

BARNES, J.

The defendant below was convicted of the crime of incest, and has brought the case here by petition in error.

The information contained three counts. The first charged the defendant with what is commonly called statutory rape; the second count contained a charge of rape as defined by the common law, with an additional allegation that the victim was the defendant's daughter; while the third count charged him with the crime of incest as defined by section 203 of the criminal code. The defendant filed a motion to quash the information for duplicity. The state thereupon elected to proceed to trial upon the third count alone, and the motion was therefore overruled. The jury returned a verdict of "guilty, as charged in the information," and the defendant assigns error for that the verdict does not respond to the count of the information on which the prosecution elected to go to trial. It is insisted, under the rule announced in *Williams v. State*, 6 Neb. 334, that, where there are distinct offenses charged in different counts of the information, as in the case at bar, the jury must either return a general verdict of not guilty, or respond specially to each charge in the information. Since the decision in *Ford v. State*, 79 Neb. 309, the above rule has been abrogated in this state, for *Williams v. State*, *supra*, and *Casey v. State*, 20 Neb. 138, were expressly

overruled by that decision. The rule by which this question is now governed is, where several counts are included in the same information, a conviction on one count may be sustained, although the jury ignore the others; and a judgment upon one of several counts, with no verdict as to the others, operates as an acquittal on the other counts. Again, as above stated, the defendant was prosecuted upon the third count of the information, which charged a violation of the provisions of section 203 of the criminal code, and by the instructions of the court it was made plain that the charge contained in that count was the one to which the verdict of the jury must respond. So, for the purpose of the trial, the case stood as though there was only one count contained in the information, and the verdict of guilty, as charged, clearly responded to that count.

It is next contended that the trial court erred in overruling defendant's challenge of the juror Meyer for cause. It appears that Meyer had read the newspaper accounts of the transaction, and for that reason alone had an impression or opinion as to the guilt or innocence of the defendant, which he said would require some evidence to remove. The juror further stated that the fact that any one was accused of having committed so heinous a crime would, to a certain extent, create in his mind a prejudice against him. However, in response to questions propounded by the court, the juror clearly stated that his impression or opinion was founded solely on newspaper accounts, and, if retained as a juror, his impression so formed would not interfere with his rendering a fair and impartial verdict upon the evidence and the instructions of the court. It seems clear, therefore, that the juror brought himself within the rule announced in *Bohanan v. State*, 18 Neb. 57, *Busye v. State*, 45 Neb. 261, 277, *Bolln v. State*, 51 Neb. 581, and *Barker v. State*, 73 Neb. 469. The challenge, therefore, was properly overruled.

It is further contended that the court erred in giving the first and second paragraphs of his instructions, for the reason that they treated the information and all of its

counts as an entirety. We do not so understand them. They clearly defined the crime charged in the count on which the defendant was prosecuted, and by the third paragraph of the instructions the jury were plainly told that in order to find the defendant guilty the state must prove all of the elements of the crime (describing them as set forth in that count) beyond a reasonable doubt. So it is apparent that the jury were not misled by the instructions complained of.

Complaint is also made of the giving of the seventh instruction, which treats of the necessity for corroboration. An examination of the instruction shows that the jury were clearly informed that they could not convict the defendant upon the uncorroborated evidence of the prosecutrix, and this statement was followed by a definition of that term which has been many times approved by this court.

Defendant further insists that the court erred in refusing to give the tenth instruction tendered by him, in modifying it, and finally giving it as modified. It appears that when accused of his misconduct by the prosecutrix and her grandmother, to whom she first related her story, the defendant fled to another state. Later on he returned to Nebraska, but not to his former home, and was finally arrested in a county other than that of his residence. The instruction on that point, as tendered by him, contained the following: "You may look on it as evidence of fear, or of summary punishment at the hands of his accusers." The words quoted were stricken from the instruction by the court, and as thus modified the charge was left in the form usually given in such cases. The record contained no evidence showing, or tending to show, that there was any excitement in the community where the defendant lived on account of the charge made against him, or that his accusers ever threatened him with any summary punishment whatsoever. Therefore the court properly modified the request, and did not err in giving it in its modified form.

Finally, it is contended that the verdict is not sustained by sufficient evidence. It would serve no good purpose to quote the evidence in this case with all of its disgusting details. It is sufficient to say that the prosecutrix, who appears to be a bright, intelligent girl, nearly 16 years of age, testified that her father (the defendant) took undue liberties with her person from time to time, as opportunity offered, from July until December, 1906; that on Christmas night of that year he got into bed with her, and, against her protest, partially accomplished his purpose. Again, in the absence of her grandmother from the house, between Christmas and the first day of January following, he came to her bed and repeated the transaction; and, finally, on the night of the 2d of January, 1907, he again got into bed with her and fully consummated the act of sexual intercourse with her. She testified that in so doing he broke the bed down, and it appears that, when her grandmother returned to the home on the following morning, she found the bed in that broken condition. It further appears that about a week thereafter the prosecutrix told her grandmother and her aunts what her father had done to her. It further appears that defendant, when accused of the crime by the members of his household, fled to an adjoining state, and was finally arrested in a county other than that of his residence. Again, the prosecutrix was examined immediately after she made her complaint by two reputable physicians, who found nothing in her condition tending to render her evidence incredible. Her grandmother testified that she heard a conversation, in which the defendant was directly accused of having taken improper liberties with the girl, which he failed to deny. It was therefore the province of the jury to consider all of the evidence and determine its weight, sufficiency and effect, and, having done so, a finding of guilt should not be disturbed by a reviewing court. It is said that a conviction cannot be had in such a case upon the uncorroborated testimony of an accomplice. But, as we have seen, such is not the case here. In *Schwartz v. State*, 65 Neb. 196.

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an instruction informing the jury that the prosecutrix, who had, under physical and moral coercion, maintained incestuous relation with the defendant, who was her father, was not an accomplice, was held to state a sound and relevant proposition. The facts disclosed by the evidence in the case at bar bring that question clearly within the foregoing rule.

A careful examination of the record fails to disclose any reversible error, and the judgment of the district court is

AFFIRMED.

**JOHNSON COUNTY, APPELLEE, V. CHAMBERLAIN BANKING
HOUSE ET AL., APPELLANTS.**

FILED NOVEMBER 21, 1907. No. 14,965.

1. **Banks: BONDS: EXECUTION.** The cashier of a bank is the proper officer to execute a bond on its behalf to secure a deposit of public money made therein, and the bank will be bound by such execution, in the absence of some rule or regulation adopted by the directors or stockholders requiring special authority on the part of the cashier to execute such bonds, and notice of such fact brought to the attention of the obligee therein.
2. **Bonds: SURETIES.** A surety signing a bond after other sureties have executed the same affirms the genuineness of the previous signatures.
3. ———: ———: **LIABILITY.** A surety who signs a bond upon the condition that it is to be signed by other sureties is not released from liability thereon because the others did not sign, unless notice of the condition on which his signature was obtained is brought home to the obligee.

APPEAL from the district court for Johnson county:
WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

L. C. Chapman, S. P. Davidson, J. B. Douglas and E. M. Tracy, for appellants.

J. C. Moore and Hugh La Master, contra.

DUFFIE, C.

This case was before us on a former appeal taken by the plaintiff from a judgment dismissing its petition. The judgment was reversed and the case remanded for further proceedings. The opinion on the former appeal is found in 74 Neb. 549. When the case again reached the district court, the defendants filed separate answers. Graff and Taylor, two of the sureties, in their answers alleged, first, that the bond was not signed by the Chamberlain Banking House by any one having due authority. The answer of Taylor contained the further allegation that the cashier and teller of the bank represented to him that one W. R. Barton was also to sign the bond as surety before delivery thereof, and both of these sureties allege it was represented to them that the name of the bank was signed by a party having due authority. As a second defense, the answers allege that the bank is in the hands of a receiver; that the suit in which the receiver was appointed is still pending and undetermined, and that this suit cannot be maintained in consequence of the pendency of such action. As a third defense, defendants allege that the plaintiff has received 19 per cent. of the debt sued for in the way of dividends paid by the receiver of the bank by order of the court; fourth, a general denial. A demurrer was interposed to the first, second and third counts or defenses alleged in these answers, which was sustained by the court, and the case went to trial upon the issue made by the general denial. The trial resulted in a judgment for the plaintiff, and the defendants Graff and Taylor have appealed.

The first assignment of error relates to the action of the district court in sustaining the demurrer interposed to the alleged defense set up in the answer, viz., that the name of the bank was not signed to the bond by any one having authority. The bond shows upon its face that the name of the bank was signed by, "Charles M. Chamberlain, Cashier," that it is conceded that said Chamberlain was

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cashier of the bank at the time the bond was executed, and the proof shows that the name of the bank attached to the bond is in his handwriting. As said in the former opinion, "the bank can contract only by its agents," and the cashier is the proper agent to execute a bond on its behalf. This being so, the bank, as said Judge AMES, is without doubt bound by such signature. But, even if the name of the bank was attached to the bond by a person who had no authority, still the sureties would not be released because of such want of authority. In *Selser v. Brock*, 3 Ohio St. 302, it was held that a surety who had signed his name to a promissory note after the names of others in effect affirmed the genuineness of the previous signatures, and could not avoid liability by showing that such names had been forged by the principal, but of which the creditor had no knowledge. And in *Bigelow v. Comegys*, 5 Ohio St. 256, it was held that a surety on a replevin bond could not set up the defense that he was induced to sign the bond upon the fraudulent representation of the principals that a cosurety was responsible and had already signed it, when, in fact, his signature was a forgery. The same principle was held by the supreme court of Indiana in *Helms v. Wayne Agricultural Society*, 73 Ind. 325. These cases were approved and followed by this court in *Lombard v. Mayberry*, 24 Neb. 674, and such is the settled law of the state. The court did not err in overruling the first defense set out in the answer of the sureties.

The second defense, that the suit was prematurely brought because of the pendency of the receivership action, is not relied upon in the briefs of defendants, and all that need be said relating to that question is that the present suit was commenced September 2, 1902, while the action in which the receiver was appointed was commenced September 11, 1902.

And the fact alleged in the third defense, that the plaintiff has received dividends from the receiver and credited the same on the amount due from the bank, cannot be regarded as an accord and satisfaction of its claim, and is a

matter going to benefit the defendants and of which they cannot complain.

The fact that the cashier and teller of the bank represented to Taylor that one Barton would also sign the bond is no defense, unless knowledge of such representation was brought home to the county. The fact that Taylor may have been induced to sign the bond by fraudulent representations made to him by officers of the bank does not affect the right of action against him by one not a party to the fraud. *Martin v. Campbell*, 120 Mass. 126; *Casoni v. Jerome*, 58 N. Y. 315. In *Brandt, Suretyship and Guaranty* (1st ed.), sec. 355, it is said: "A bond, perfect on its face, apparently duly executed by all whose names appear therein, purporting to be signed, sealed and delivered by the several obligors, and actually delivered by the principal without stipulation, reservation or condition, cannot be avoided by the sureties upon the ground that they signed it on the condition that it should not be delivered unless it should be executed by other persons who did not execute it, when it appears that the obligee had no notice of such condition, and nothing to put him on inquiry as to the manner of its execution." There are cases which hold that if the body of the bond contains the names of sureties, and the parties so named have not signed and executed the bond, this is a circumstance sufficient to put the obligee upon inquiry and charge him with notice of the condition (*Brandt, Suretyship and Guaranty* (1st ed.), sec. 357), but the bond in this case was perfect on its face, and there was no fact which would in anywise put the county upon inquiry as to whether the sureties whose names appeared upon the bond signed upon the condition that other sureties were to join therein.

The several special defenses alleged by the defendants and contained in the first, second and third counts of their answers were not good in law, and the court did not err in sustaining the demurrer interposed against the same.

We find no error in the record and recommend an affirmation of the judgment.

EPPERSON and GOOD, CC., concur.

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By the Court: For the reasons stated in the foregoing opinion, the judgment is

AFFIRMED.

AMY M. PAULE, APPELLANT, v. MARY M. SCOFIELD,
APPELLEE.

FILED NOVEMBER 21, 1907. No. 14,971.

Mortgages: FORECLOSURE: SALE: CONFIRMATION. An order confirming the sale of real estate by a court having jurisdiction of the parties and subject matter, in the absence of fraud, cures all defects and irregularities in the appraisement, and is conclusive upon all the parties to the suit and those claiming under them, until reversed or set aside.

APPEAL from the district court for Dawes county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Allen G. Fisher, for appellant.

Albert W. Crites and *E. M. Slattery*, contra.

DUFFIE, C.

In October, 1887, William E. Baker, the owner of the southwest quarter of section 14, township 31 north, of range 51 west, in Dawes county, Nebraska, executed two mortgages thereon, both running to the American Investment Company. The first mortgage, made to secure a loan, was transferred to Benjamin Wheeler, the investment company retaining the second mortgage, given for commission on the loan, and foreclosing the same in the year 1891. The service in this foreclosure proceeding was by publication, and the decree gave a lien upon the land subject to the first mortgage. May 8, 1891, the decree was set aside and defendants allowed to defend. In December, 1891, a second decree was entered, but through some mistake or oversight was not journalized at the time nor until June, 1902, when a decree *nunc pro tunc* was journalized.

Soon after the second decree was pronounced, an order of sale was issued under the first decree, which, as already stated, had been set aside, and an appraisement, sale, confirmation and deed made thereunder to the investment company. The title obtained by this deed was conveyed to Wheeler, the holder of the first mortgage, and by him to Mary M. Scofield, and to clear and perfect the record Wheeler executed a release of his first mortgage. Mrs. Scofield took immediate possession of the land and has since continued in possession. Baker's original title, through sundry mesne conveyances, came to one Eugene Paule, the husband of appellant, who brought an action in ejectment against Mrs. Scofield. Pending this action, the court entered the *nunc pro tunc* decree of foreclosure above referred to, and another appraisement and sale was had thereunder, Mrs. Scofield becoming the purchaser. At this sale a surplus of \$78.56 was reported by the sheriff and paid into the court, and this sum was claimed by C. C. Thomas, Paule's assignee, and was taken out and receipted for by their attorney in that action. Thereafter Thomas assigned to the plaintiff and appellant all right of action by him held against the defendant for any remainder of the surplus due him and arising from the sale of said mortgaged premises, and she brought this action, alleging that there was a further surplus due Thomas and belonging to her under said assignment, amounting to more than \$500. This claim is made upon the theory that the old appraisement should govern the sheriff in making his sale under the *nunc pro tunc* decree, and that the surplus should be computed with reference thereto, rather than with reference to the new appraisement under which the sale was actually made. The old appraisement, which was made subject to taxes and first mortgage, showed the value of defendant's interest in the land to be \$165.28, while the new one, under which the sale was made and under which the plaintiff waived all liens, showed the value of such interest to be \$200. A further claim is made that Wheeler, having released the first mortgage, the

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amount thereof, viz., \$200, should be added to the value of defendant's interest under the first appraisalment. From a judgment dismissing her petition, plaintiff has appealed. The record shows that Thomas and appellee both appeared when the court confirmed the last sale and fixed the amount of the surplus at \$78.56, and directed that it be paid over to Thomas or his attorney.

We regard the order confirming the sale and awarding a surplus of \$78.56 to Thomas as a final adjudication of the amount of the surplus arising from the sale under the decree, which cannot be questioned in a collateral proceeding. It is evident that plaintiff, claiming through Thomas, has no greater rights than were held by him when he assigned to her. Thomas, appearing at the confirmation, accepted the benefit of the order awarding the surplus. There is no showing that he then labored under any misapprehension of his rights or that he was not fully aware of all the proceedings had in the case. In *Watson v. Tromble*, 33 Neb. 450, it is said: "An order confirming a sale of real estate by a court having jurisdiction of the parties and subject matter, in the absence of fraud, cures all defects and irregularities in the appraisalment and is conclusive upon all the parties to the suit and those claiming under them, until reversed or set aside." This we think conclusive of the case and of the plaintiff's right to question the appraisalment under which the sale was made. Aside from this, the claim of the plaintiff, that the appraisalment should have been made and the surplus adjusted upon the theory that the first mortgage had been canceled, is without equity. Wheeler, who took title under the first invalid sale, conveyed his supposed title to the defendant, and, that the first mortgage which he then held might not cloud her title, he executed a release thereof. This release was made in the interest of the defendant. Whatever equitable right there was which could be grounded upon the first mortgage inures to the benefit of the defendant, and not to the plaintiff or any one with whom she was in privity.

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We are satisfied that the judgment of the district court was right, and recommend its affirmance.

EPPELSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WILLIAM A. HARRISON ET AL., APPELLANTS, V. FREDERICK J. HARRISON ET AL., APPELLEES.

FILED NOVEMBER 21, 1907. No. 14,992.

1. **Specific Performance: ORAL CONTRACT: EVIDENCE: PERFORMANCE.**

The law is well settled in this state that an oral agreement to convey real estate will be specifically enforced where the evidence of such agreement is clear and satisfactory, and the plaintiff has fully performed on his part.

2. ———: ———: ———. Where the acts performed by the plaintiff tend to show, not only that there was an agreement, but also throw some light on the nature of that agreement, the evidence cannot be said to rest wholly in parol, the parol evidence being auxiliary to the proof afforded by the case itself.

3. **Declarations against interest** cannot be annulled or explained away by counter declarations.

APPEAL from the district court for York county:
ARTHUR J. EVANS, JUDGE. *Affirmed.*

Charles F. Stroman and Gilbert Bros., for appellants.

Power & Meeker, F. J. Harrison and E. F. Harrison, contra.

DUFFIE, C.

This action was brought to partition the southeast quarter of section 29, township 10, of range 2, in York county, Nebraska. The land was owned by James Harrison, who died intestate in February, 1905, leaving as his

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only heirs the plaintiffs William A. Harrison, a son, Hattie E. Shepardson, a married daughter, and the defendant Frederick J. Harrison, his youngest son. The following facts are not in dispute: The wife of James Harrison, the decedent, and the mother of the children above named, died in 1873, in the state of Iowa, where the family then lived. At the time of their mother's death William A. Harrison was about six years old, Frederick J. about three years, and Hattie but a few weeks old. Some four years after the death of their mother, the children William A. and Hattie E. came to York county, Nebraska, with their grandfather, Frederick J. and his father remaining in Iowa until about seven years later, when they also came to York county. The father never remarried, and, after moving to York county, James Harrison, who was a stone mason, continued to work at his trade, boarding most of the time at restaurants and hotels up to the year 1893. In the year 1890 James Harrison and Frederick J. went to Denver, Colorado, where Frederick secured employment as an apprentice to a plumber of that city, and during his employment there for less than a year gained some knowledge of the trade. In the summer of 1891 he came to Lincoln, Nebraska, and his father returned to York county. The farm in question was purchased by the father in the year 1892, and in the spring of 1893 he and his son Frederick J. moved upon the farm, living there together until 1898, when Frederick J. was married, bringing his wife to the farm, where they continued to live with the father until his death in February, 1905. In the meantime William A. Harrison had married, and was living in the state of Colorado. The daughter Hattie had married one Shepardson and was living with her husband in York county, some three or four miles distant from her father's farm. After the death of James Harrison, Frederick J. continued in possession of the farm, asserting title thereto under an alleged oral agreement with his father. This action for partition was commenced by his brother and sister, and in an answer

and cross-bill filed by Frederick J. it is alleged that, from the time that his father came to York county in 1884 until the latter part of 1891, he continued to work at his trade as a mason in the city of York, boarding and lodging first at one place and then another, having no fixed place of abode, and none of his children or other relatives with him; that, during the latter part of the year 1891 and the early part of 1892, his father urged him to give up his plan of pursuing the plumber's trade, and to make arrangements so that they could live together during the remainder of his father's life, and, as an inducement to do so, his father offered to purchase a farm in York county where they would make a home and live together; that, in consideration thereof, upon the father's death, the farm should become the property of the said Frederick J. Harrison; that he accepted this proposition and came to York county from Lincoln in the spring of 1892, and, with his father, selected the farm in question, his father paying \$4,000 therefor; that the farm was leased at the time, so that they did not occupy it until the spring of 1893, when they took possession together under their said oral agreement, and from that time forth defendant continued in possession with his father and occupied the same until his father's death. It is alleged that he fully performed the agreement upon his part, and that, because of said agreement and his performance thereof, he became the owner of said farm, and that the plaintiffs have no right, title or interest therein. The prayer is for a decree quieting his title. The district court entered a decree quieting title in the defendant Frederick J. Harrison, from which the plaintiffs have appealed.

In a brief of exceptional merit plaintiffs insist that this court has gone to extreme lengths in enforcing oral agreements for the conveyance of real estate, and that there is danger of wholly ignoring the statute of frauds and the statute of wills in a too liberal policy of allowing the title to real estate to be questioned or ordered transferred from one party to another on evidence which is wholly oral. It

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is said that there were special equities in the case of *Kofka v. Rosicky*, 41 Neb. 328, and in *Teske v. Dittberner*, 63 Neb. 607, which appealed to the court for a relaxation of the rigid rule requiring evidence of the clearest and most satisfactory character to justify a court in decreeing specific performance of an oral contract for the conveyance of real estate; but, as is well said in *Kofka v. Rosicky*, *supra*, the statute of frauds should not be so rigidly adhered to as to accomplish a fraud against one of the persons affected by the contract to which it is sought to be applied, and the discretion of the court ought to be applied to each particular case when the general rules and principles which govern the court will not furnish any exact measure of justice between the parties. The statute itself recognizes the right of a court of equity to establish a claim against, or a right to a conveyance of, real estate by oral evidence in providing that "nothing in this chapter contained shall be construed to abridge the powers of the court of chancery to compel the specific performance of agreements in cases of part performance." Comp. St. 1905, ch. 32, sec. 6. By a series of decisions ending with *Peterson v. Estate of Bauer*, 76 Neb. 661, this court has firmly established the rule that oral contracts relating to interests in real estate will be specifically enforced when the evidence establishing such a contract is clear and satisfactory. In the case last cited it is said by Mr. Justice LERTON: "It is impossible to reconcile the views of the various courts of the United States upon the questions presented, but this court has adopted the rule in *Kofka v. Rosicky*, *supra*, and we are content to abide by the doctrine of that case as being the most apt to prevent injustice and to do equity. In such a case, if the trial court, bearing in mind the ease with which claims may be presented when the other party to the alleged contract is dead, carefully scrutinizes the evidence and weighs the same, taking fully into consideration the nature of the claims and the known inaccuracy of memory with reference to oral statements made years before the time of the trial, we think the evil

consequences to estates which may accrue and which the counsel for the defendant so strongly set forth may be greatly minimized. The difficulty of proving contracts made many years before, when the lips of both participants are sealed, one by death and the other by the law, operates to the disadvantage of the claimant, and it may prevent a just recovery in as many cases as the ease with which claims may be trumped up may operate to spoliage estates." That this court does not stand alone in the rule adopted is shown from the following cases: *Rhodes v. Rhodes*, 3 Sandf. Ch. (N. Y.) 305; *Winne v. Winne*, 166 N. Y. 263, 82 Am. St. Rep. 647; *Twiss v. George*, 33 Mich. 253; *Svanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490; *Brinton v. Van Cott*, 8 Utah, 480; *Davies v. Cheadle*, 31 Wash. 168; *McCullom v. Mackrell*, 13 S. Dak. 262; *Bryson v. McShane*, 48 W. Va. 126, 49 L. R. A. 527; *Howe v. Watson*, 179 Mass. 30.

It being settled that the statute of frauds does not stand in the way of the enforcement of contracts of the character alleged by the defendant, the important question in this case is: Does the evidence entitle him to the relief awarded by the district court? In the fall of the year 1891 the defendant was rooming with C. J. Wineingen in the city of Lincoln. One evening during the fall he brought his father to the house, where he remained with him during the night. Mr. Wineingen testified that in a talk between himself, the defendant and defendant's father, had during the evening and before bedtime, the old gentleman said that "he wanted Fred to go with him and live with him; that he had no home; that he had one boy that he tried to help, but it seemed that he did not take any interest in him, and thought if he could get Fred to go home with him he was going to buy a farm, or had a farm; I won't say as to that, but he wanted to get him with him to live with him, and if Fred wanted to get married he would have a home with Fred, and Fred would have what was left." Mrs. Wineingen testified that the old gentleman said "that he had come to see if he could get Fred to

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go home with him; that he told Fred that he would get a farm if he would come and go home with him and stay with him, and he said that when he was through with it Fred could have it." Again she said: "He said he had come down to see if he could not persuade Fred to go home with him, and that he would buy a piece of land or farm if he would come and live with him. He said: 'When I am through with it, it shall be his.'" This conversation between the old gentleman and witness was had in Fred's presence. The following morning Fred and his father met C. W. McKee at the depot in Lincoln. The following question was asked McKee: "Will you please tell the court just what conversation you had, what was said between James Harrison, Fred's father, and yourself in Fred's presence there at the time, and what Fred said?" He answered: "Why, yes; Fred introduced me to his father, and we stood and talked a little bit, as people generally when they meet; I don't know as I can recall, something about the weather, how he was getting along, what he had been doing, something to that effect, and Fred Harrison says: 'What do you think?' he said: 'The old man is going to take me home with him.' I said: 'Is that so? Maybe that will be a very good thing.' Then Mr. Harrison, Fred's father, said: 'I came down here to persuade Fred to go home with me,' and, he says, 'I am going to buy a farm,' he said, 'and I want Fred to make a home for me as long as I live, and when I am gone,' he said, 'the farm is Fred's.'" Sidney Roberts, who met them on this occasion, testified that Fred introduced him to his father; that the old gentleman said that he wanted to make a home for him and Fred; that he had no particular home, and that he would like to get a place where he could make a home; that he thought he could get a place near York; that Fred would stay with him, and when he died he would give Fred the farm; that when he died Fred could have it, it would be Fred's place. "I told Fred it would be a good idea for him to go with his father; and he replied that he believed that he would." Mrs. Briley testified that some

time in the year 1892 Fred and his father came to her house after the supper hour, and Fred's father apologized for making her get an extra supper, and stated why it was; that they had been out in the country looking at a farm that he was intending to buy. He then went on and told her that he was going to buy a farm to make him and Fred a home; that he had got tired of boarding around and knocking around for a home; that he and Fred always got along well together, and that it would be nice for them both to have a home. During the time that Fred and his father were in possession of the farm the father talked with his neighbors relating to the arrangement under which they were living there. Mr. E. F. Chittenden testified that "he would come down Sundays and take dinner or supper, and, when he got to talking about the farm, I asked him why it was that he would go and buy a farm. He was not able to run it. He was a stone mason, and not able physically to work it. He told me that he bought it with the expectation of having it for Fred. He had made arrangements for Fred to take care of him, and he was to have the farm. That is what he told me, I think, two or three times, or that once anyhow." Further on he testified that the old gentleman said that Fred should have the farm when he was through with it himself; that Fred was to take care of him as long as he lived, and he expected Fred to have the farm; that is the reason he had it, not for his own use to farm himself, but he expected Fred to have it; that Fred was to have the place for taking care of him. Mr. Benner testified that "James Harrison came to his place one day and seemed to be tired; that he asked him why he did not keep his money when he had it, and not lay it out in a farm, as he was not able to work; that the old gentleman replied that he bought it for Fred."

The fact that Fred abandoned the plumber's trade and went to live with his father upon the farm, where he worked without pay of any kind for five years, or until his marriage in 1898, is a circumstance which, we think, strongly corroborative of the claim that this service was

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performed under the agreement alleged in the answer and cross-bill and testified to by the witnesses. It is not usual for a young man, after attaining his majority, to go on a farm, and live alone with his father, having no women folks to look after the housework, without pay as the services are performed or an agreement for remuneration in the future. Defendant testified on cross-examination that after his marriage in 1898 he received one-half the crop raised upon the farm, but he explained that this was under an agreement made at that time, his father recognizing that he should have a portion of the crop in order to properly care for his wife and supply her with such household necessities as she might require. All the circumstances make the defendant's claim consistent and probable. His father had reached an advanced age. He had no home. He was living at boarding houses and hotels, with no one but strangers to look after his wants. It was natural that he should desire a permanent home and the companionship and care of some near relative. Under these circumstances it is not difficult to believe that he should make such a contract with Fred as the witnesses have related. It is hardly fair to presume that he would ask his son to abandon a trade, which he had partially learned, to live with him without pay until his death; and, as before stated, it is hardly probable that one who had his own way to make in the world would care to give up some years of his life to the care of a farm without some inducement held out to him to do so. The evidence, we think, conforms to the rule stated in *Waterman, Specific Performance of Contracts*, sec. 261, that the act performed tends to show, not only that there was an agreement, but also throws light on the nature of that agreement, so that neither the fact of an agreement nor even the nature of that agreement rests solely upon parol evidence, the parol evidence being auxiliary to the proof afforded by the circumstances of the case itself. A reading of the record convinces us that the agreement was made as alleged; that there has been complete perform-

ance on the part of the defendant, and that he is entitled to a specific performance of the contract.

The testimony of the neighbors to declarations of James Harrison that the farm was bought for Fred and that Fred was to have it after his death was taken by the court upon the principle that declarations against interest are always admissible, and that such declarations on the part of the decedent were in derogation of his absolute title to the farm; that he recognized and admitted that defendant had an equity in the land. The plaintiffs offered to show that on one or more occasions the decedent had made statements to the effect that he would not give his property to one child; that he would divide it equally among his children; that he stated that they wanted him to give the place to Fred, but he would not get it, and other similar declarations claimed to have been made by him. The court refused to receive this testimony, and error is claimed. *Foster & Foster v. Nowlin*, 4 Mo. 18, is cited as an authority to the effect that declarations made by a party since deceased, declaring that certain property belonged to him, was admissible and competent to rebut other evidence of his declaration to the contrary. We do not think that the weight of authority sustains this holding. In *Wilson v. Patrick*, 34 Ia. 362, it was held that antecedent declarations of a party that he was absolute owner of certain property were not admissible to counteract his admissions that he owned it as security only; and in *Nutter v. O'Donnell*, 6 Colo. 253, it is said that declarations against interest cannot be annulled or explained away by counter declarations. The rule announced in *Foster & Foster v. Nowlin*, *supra*, is no longer the law in Missouri, as that case is disapproved and the principle repudiated in *Turner v. Belden*, 9 Mo. 797.

The evidence satisfies us that the decree entered by the district court was the proper one, that there is no reversible error in the record, and we recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

VERONA UNANGST, APPELLANT, v. LINUS E. SOUTHWICK,
APPELLEE.*

FILED NOVEMBER 21, 1907. No. 14,907.

1. **Process: RETURN: IMPEACHMENT.** There is a strong presumption that the return of an officer to a writ served by him is true, but the same may be impeached in a collateral proceeding by clear and convincing evidence.
2. **Mortgages: FORECLOSURE: REDEMPTION.** Defendant, through his agent, for a valuable consideration, promised not to purchase a mortgage upon plaintiff's homestead nor to interfere with plaintiff's purchase thereof. Afterwards, in violation of his agreement, he purchased the mortgage, and upon foreclosure of it bought the land. *Held*, That plaintiff, who was not served with notice of the foreclosure suit, is entitled to redeem by the payment to defendant of the amount paid for the mortgage, with interest at 7 per cent. per annum.
3. **Vendor and Purchaser: DURESS.** Evidence examined, and *held* insufficient to show that plaintiff's contract to convey land in settlement of her husband's indebtedness was secured by duress.

APPEAL from the district court for Logan county: HANSON M. GRIMES, JUDGE. *Affirmed in part.*

H. M. Sullivan, for appellant.

Hoagland & Hoagland, contra.

EPPERSON, C.

In 1899 or 1900, the plaintiff's husband, George T. Unangst, purchased of Harris & Company certain cattle, giving his notes secured by mortgage upon the cattle. Harris & Company sold their notes and mortgage to the

* Rehearing allowed. See opinion, p. 119, *post*.

First National Bank of Friend, Nebraska, and guaranteed payment. The indebtedness was renewed from time to time by and in the name of Harris & Company, but remained the property of the defendant bank. August 11, 1903, the time for the payment of the indebtedness was extended for 90 days and additional security given upon personal property and real estate. One hundred and sixty acres of the land mortgaged soon thereafter became Unangst's homestead, which was incumbered by a prior mortgage of \$600. August 14, 1903, the defendant bank brought three replevin actions against different parties to recover personal property alleged to have been included in the bank's mortgage, and four complaints were also filed by defendant before a magistrate, charging Unangst with feloniously selling a portion of the mortgaged property. Unangst waived preliminary hearing upon these charges and gave bond for his appearance. Soon after the institution of these several suits, negotiations were begun for a settlement, which was consummated about October 20, 1903, but was not reduced to writing. The replevin actions were dismissed. The defendant bank surrendered the notes given by Unangst and released its mortgage on the homestead. Unangst transferred certain personal property to the bank, and conveyed all of the land described in the mortgage, except the homestead, and his wife, plaintiff herein, as a part of the settlement, conveyed to the bank 160 acres of land belonging to her. December 8, 1903, Southwick, defendant herein and president of the defendant bank, instituted an action to foreclose the prior \$600 mortgage upon the homestead, which mortgage had been assigned to him. A decree of foreclosure was entered, under which the land was sold to Southwick and the sale, over the objections of the defendant, George Unangst, confirmed. Plaintiff herein, the wife of the said George Unangst, began this action August 3, 1905, and seeks to redeem the homestead from the \$600 mortgage foreclosed by Southwick, alleging that, as part of the agreement of settlement, defendant promised not to pur-

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chase the mortgage foreclosed; that defendant purchased the same contrary to their agreement, and paid therefor only \$200; that plaintiff was not served with summons in the foreclosure suit; and plaintiff asks that she may be permitted to redeem on the payment of \$200. She also seeks to set aside the transfer of her land to the defendant Southwick, alleging, in substance, that she conveyed the same because of the criminal prosecutions instituted against her husband and defendant's promise to discontinue the same upon settlement; that the criminal actions were instituted for the purpose of extorting money and property in excess of the amount due, and, further, in consideration of the defendant's promise not to interfere with and prevent her purchase of the first mortgage upon the homestead. The judgment in the lower court was for the defendant, and plaintiff appeals.

As to the homestead: Defendant contends that the foreclosure suit settled the question here in controversy; and that the sheriff's return to the summons may not be collaterally assailed. This question has been settled by this court. In *Wilson v. Shipman*, 34 Neb. 573, it is held: "The return of an officer on a summons that he had personally served a copy of the same on the defendants may be contradicted and disproved by the defendant; but it must be clear from the evidence and circumstances that the return is untrue, otherwise it is the duty of the court to sustain it." It is true the summons therein was issued by an inferior court, but in announcing the rule no distinction is made between a summons of an inferior court and one of a court of general jurisdiction. In *Holliday v. Brown*, 33 Neb. 657, 34 Neb. 232, a summons of a district court was assailed in an action upon the judgment based thereon, and it was held that a party not served was not bound thereby. See *Campbell Printing Press & Mfg. Co. v. Marder, Luse & Co.*, 50 Neb. 283. These decisions we think are right and should be adhered to. The return of the sheriff shows that the summons here in controversy was served personally upon the plaintiff herein. There is

a strong presumption that the return of the officer is true, and it cannot be impeached except by clear and convincing evidence." At the time of the purported service, the sheriff had for service the summons in the foreclosure suit and also a notice for the appointment of a receiver. The sheriff testified that he handed a copy of each paper to the plaintiff in the presence of her husband and one other witness. The husband and the other witness corroborate the plaintiff, who testified that the sheriff handed to her a copy of the notice for the appointment of the receiver, but no copy of the summons. Upon all the evidence, the trial court found that the summons was not served upon the plaintiff herein, and we consider such finding fully sustained by the evidence.

There is a conflict in the evidence as to the terms of the settlement made by the parties. Defendant had a mortgage on the homestead and on 320 acres of other land, and also upon considerable personal property. It was the intention of all parties that plaintiff and her husband should settle the latter's indebtedness to defendant by conveying a part of the property. At the time of the settlement all parties knew that the \$600 first mortgage upon the homestead could be satisfied for \$200. It appears from plaintiff's evidence that prior to the consummation of the settlement she learned that defendant Southwick had negotiated for and arranged to buy the first mortgage, then in the hands of one Williams, to be transferred whenever the \$200 was paid therefor. She and her husband, desiring to retain their homestead and knowing that defendant had negotiated for the mortgage, insisted that he should not purchase the mortgage, but permit them to redeem the same and take the homestead free from defendant's mortgage; that plaintiff, to save her homestead, deeded 160 acres of her own land to the defendant, which, with other lands, as above stated, was taken by defendant in full settlement of the indebtedness. The negotiations for settlement were conducted mostly for defendant by Mr. Gilchrist, who was in the employ of Harris & Com-

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pany. Witness Hartzell testified that Mr. Gilchrist told him that it was the proposition to put Mrs. Unangst's place in the mortgage and throw the other place out, that she would turn over her place instead of that. Witness Bailey testified that Gilchrist told him after the consummation of the settlement that they (the defendants) had agreed to let the first mortgage alone. Defendant negotiated for the purchase of the \$600 mortgage to protect his own lien. Before redeeming therefrom, his settlement with Unangst was complete and he needed no protection from the mortgage. Thereafter the adventure was but a speculation with him. He and his agent Gilchrist deny ever having said anything to the Unangsts about the \$600 mortgage, and never agreed not to purchase. Be this as it may, he either violated his contract not to buy, or procured the settlement by wrongfully withholding from plaintiff and her husband the fact that he had negotiated for and intended to buy it, and thereby procure not only the 480 acres plaintiff was satisfied to convey, but in addition thereto the other 160 acres—their homestead. Defendant's attorney testified that on the final settlement defendant wanted a deed to this land to save foreclosure, and that "Mr. Unangst refused to deed that, and for the purpose of getting a settlement we cut that out of the proposition." Mr. Williams, who acted as agent for defendant Southwick in negotiating for the purchase of the \$600 mortgage, and who was called as a witness by the defendant, corroborates the evidence of the plaintiff's husband, and contradicts the deposition of Gilchrist to the extent that there was a controversy between Gilchrist and Unangst as to the mortgage. At the time of the settlement Mr. Williams had the mortgage in his possession, and subsequently thereto turned it over to the defendant. And, further, Gilchrist told witness that he expected the defendant's negotiation for the mortgage would make trouble. This witness had told Unangst that he held the mortgage for Southwick upon the payment of \$200. This fact, and the other circumstances indicating that defendants,

through their agents, knew that the Unangsts considered that they were saving their home farm, argues that the plaintiff's conduct in the settlement and her theory of the contract were reasonable and true. It is apparent from the situation that the only object plaintiff herein would have in substituting her own land for the homestead was that the latter might be spared to her. The finding of the trial court as to this fact was also for plaintiff, and we are convinced from the evidence that Mr. Gilchrist, who was agent for defendant, as part of the consideration for the settlement and especially to procure for his principal the plaintiff's land which she conveyed to the defendant Southwick, promised that plaintiff and her husband should not only have a release of defendant's mortgage, but that defendant would not purchase the \$600 mortgage. The trial court considered the facts insufficient to permit the plaintiff to recover; but good faith and honest dealing required the defendant to abandon all claim to the defendant's homestead and to the prior mortgage thereon. Defendant having purchased the mortgage in violation of the contract for settlement, and foreclosed the same and procured an order confirming the sale thereof, the plaintiff is entitled to redeem, and is entitled to an order quieting the title thereof in her husband upon the payment of defendant's actual expenditure in the purchase of the mortgage, with interest.

Plaintiff herein also seeks to set aside the conveyance of her land to the defendant, because a part of the consideration therefor was the dismissal of the criminal suits against her husband; and, further, because the fact that the criminal cases were pending and the alleged promise of defendant to dismiss amounted to duress. There is no merit in this contention. In the first place, plaintiff in this same action seeks specific performance of a part of the contract of settlement by asking affirmative relief based thereon as above shown, and to which she is entitled only upon an adjudication that the contract was legal. And, again, the evidence shows that plaintiff's husband was as

active as defendant in bringing about a settlement of his indebtedness, and that he had no fear of a conviction on the criminal charge. It is not shown that defendant procured by the settlement any advantage other than the saving of the expense of foreclosing its mortgage. Neither is it shown that defendant procured the settlement by threats of criminal prosecution. The record contains no evidence that the pending criminal suits controlled the plaintiff's conduct, or that her mind was overcome by threats, or that any undue advantage was taken of her or her husband. At most, under plaintiff's evidence, she substituted her land for the purpose of preserving her homestead. Considering the first mortgage worth but \$200—the price for which all parties knew it could be had—there was no substantial difference in the value of their interests in the two properties. This court has ever condemned the conduct of persons using the criminal code for their own financial advantage, but judicial condemnation is uncalled for here. It does not appear that defendant instituted the criminal cases for the purpose of collecting money, nor did he threaten to prosecute them in case the settlement was not had. She deeded her land for a legal and adequate consideration—the canceling of the liens against her homestead. In *Morse v. Woodworth*, 29 N. E. 525 (155 Mass. 233), cited with approval and quoted at length by this court in *Hargreaves v. Korcek*, 44 Neb. 660, it was held: "Where defendant, by such threats of arrest and imprisonment as would overcome the mind and will of an ordinary man, compels a settlement which plaintiff would not have made voluntarily, plaintiff, even though guilty of the embezzlement, may avoid such settlement on the ground of duress." In the opinion it is said: "The question in every such case is whether his liability to imprisonment was used against him, by way of a threat, to force a settlement. If so, the use was improper and unlawful; and if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they overcame his, he may avoid the settlement." None of the elements of

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duress is shown in the case at bar, and plaintiff is not entitled to have her deed canceled.

That portion of the judgment of the district court denying plaintiff the right to redeem the first mortgage for \$200 should be reversed, and the cause remanded, with instructions to permit plaintiff to redeem from the sale of the homestead property by paying defendant the amount of his expenditure, to wit, \$200 paid for the prior mortgage, with interest at 7 per cent. per annum from November 1, 1903, the date of the purchase.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, that portion of the judgment of the district court denying plaintiff the right to redeem from the first mortgage upon the payment of \$200 is reversed, and the cause remanded, with instructions to enter a decree permitting plaintiff to redeem from the sale of the homestead property by paying defendant \$200 paid by him for the prior mortgage, with interest at 7 per cent. per annum from November 1, 1903. In all other respects the judgment of the district court is affirmed, with costs in this court taxed against the defendant.

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed June 4, 1908. *Former judgment modified and judgment of district court affirmed:*

1. **Process: RETURN: IMPEACHMENT.** The return of an officer cannot be impeached except by clear and convincing evidence.
2. **Opinion Modified.** The former opinion in this case, *ante*, p. 112, is modified.

EPPERSON, C.

Upon rehearing and further consideration of this case, I am convinced that a part of our former opinion, *ante*, p. 112, is wrong. This is an action to redeem from a

mortgage upon land owned by plaintiff's husband and occupied as a homestead. The land had been purchased at judicial sale by the defendant Southwick, who owned and foreclosed the mortgage. The sale had been confirmed and a deed issued to the purchaser. Plaintiff's alleged cause of action arose prior to the foreclosure. It is apparent that to recover she must prove that she had not been served with summons and had not appeared in the foreclosure case. The evidence bearing upon this question consisted of the sheriff's return of the summons showing personal service and his own testimony in support thereof. The plaintiff, her husband, and sister, who were present at the time of the service of the papers, testified that she was served only with notice of the application for the appointment of a receiver, and was not served with summons. At the same time and in the presence of the plaintiff all witnesses agree that both notice and summons were served upon the plaintiff's husband.

The error in our former opinion is the application to this case of the rule announced in the first paragraph of the syllabus. Similar evidence was held in *Wilson v. Shipman*, 34 Neb. 573, insufficient to impeach the officer's return to a court of inferior jurisdiction. The sheriff went to the home of the parties for the express purpose of serving the summons and the notice of the application for a receiver upon the plaintiff herein and her husband. It seems improbable that he would serve upon the plaintiff only the notice of the application for receiver and make his return showing the service of the summons upon her. He had the opportunity to serve it. In the summons, both the husband and wife were named as defendants. We fear that it would be a dangerous precedent to adhere to a rule which would permit an officer's return to be superseded by such evidence as this. It would offer an opportunity for the practice of fraud and perjury, and the due administration of justice might be considerably hampered by dishonest litigants, who, after making no response to the process of the court, would appear collaterally and defeat

the officer's return. However, we do not charge such motives to the plaintiff, but the circumstances in this case strongly corroborate the sheriff's return. Although the lower court found that the summons in the foreclosure suit was not served upon the plaintiff herein, we are now convinced that the evidence in support of such finding is not clear and convincing. Again, it appears from the testimony of the plaintiff that at the time of the service of the summons and the notice that she saw and read the summons served upon her husband. She had received notice of the application for the appointment of a receiver in the same case. Thus, it appears that she received, directly from the process of the court, actual notice of the pendency of the suit. The facts relied upon by the plaintiff herein should have been pleaded as a defense to the foreclosure suit, or would have entitled her to appear therein and enforce her rights to redeem. She should have made use of that opportunity.

We therefore recommend that the former opinion be modified, as suggested, and that the judgment of the district court be wholly affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons above given, the former opinion in this case is modified, as suggested, and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

LINUS E. SOUTHWICK, APPELLEE, v. GEORGE F. UNANGST
ET AL., APPELLANTS.

FILED NOVEMBER 21, 1907. No. 14,941.

APPEAL from the district court for Logan county: HAN-
SON M. GRIMES, JUDGE. *Affirmed.*

H. M. Sullivan, for appellants.

Hoagland & Hoagland, contra.

EPPERSON, C.

Defendants appeal from an order overruling the motion of the defendant George Unangst to set aside a judicial sale and a confirmation of such sale. The clerk certified that the record here presented was a true and perfect transcript. It does not contain a copy of the objections filed, nor is there a bill of exceptions presented. No reason is given for setting aside the sale, except that the notice of sale was not published as required by law, and this question was not presented to the lower court.

The land involved herein is a part of the subject matter of another action between some of the same parties. *Unangst v. Southwick*, ante, p. 112. It appears that appellants desire and believe that they are entitled to delay the confirmation until the other action is disposed of. The other action is between Verona Unangst and plaintiff herein, and is to redeem the land in controversy. The fact of its pendency furnishes no reason for delaying the confirmation upon the motion of George T. Unangst, nor does the confirmation of the sale to the plaintiff herein prevent redemption by Verona Unangst.

We recommend that the judgment of the lower court be affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

IN RE ESTATE OF WILLIAM NECKEL.

ELIZABETH NECKEL, ADMINISTRATRIX, APPELLEE, v.
AUGUSTA N. STEARNS, APPELLANT.

FILED NOVEMBER 21, 1907. No. 14,983.

Witnesses: COMPETENCY. Under the provisions of section 329 of the code, an interested party may testify only to such conversations and transactions had with the adverse party's decedent as were testified to by some witness called by the representative, or to such facts as may be presented in the preserved testimony of the deceased.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

Weaver & Giller, for appellant.

E. W. Simeral and *C. W. Haller*, *contra*.

EPPERSON, C.

At his death, and for five months previous thereto, the deceased, William Neckel, resided in Omaha with his daughter, the appellant. Four days prior to his death, a grandchild, the son of one of the appellees, a boy about eleven years of age, in the presence of his aunt, the appellant found \$385 in money hidden by the deceased in a house in which he had previously resided for a number of years. The boy carried the money to his grandfather. After the decedent's death the appellant handed the \$385 to her brother, one of the appellees, and asked him to take care of it for her. Thereafter she demanded a return of this money. He refused, and later gave the money to the administratrix of his father's estate. A few hours before the

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father's death the appellant obtained from him \$214, which she later, acting upon the advice of counsel, turned over to the administratrix. She brings this action, demanding a return to her of the sum of the two items referred to above. She alleges that for several years prior to his death the deceased collected rent from several houses belonging to her, with the understanding that he was to use what he needed and turn over the remainder to her; that the sums above named were proceeds from this rental which was not used by deceased, and that the same was turned over to appellant by him.

The only question presented by appellant is that the court erred in striking out her testimony regarding a conversation and transaction between the deceased and herself. Such evidence was incompetent under the provisions of section 329 of the code, unless it fell within the exception permitting an interested party to testify when the representative of the deceased has called a witness who shall have testified regarding the same. The executor called the boy who found the money, and he testified that he took the money to the deceased, "and said: 'What do you think I got?' and handed him the money and he stuck it in his apron quick. He groaned and said: 'Where did you find it?' and I said: 'I got it up in the old house,' and she (meaning the appellant) gave me a dollar." In rebuttal appellant testified: "Q. State what was first said, and by whom, about the boy handing him the money? A. He said: 'Why did you let the boy in the house? This was your money that I had saved out of the rent. I did not want Will to know it.'" Appellant testified that this statement of the deceased was made in the presence of the boy, and following the statement testified to by him. And she further said that a few hours later her father gave her the money. Her evidence in this regard was stricken from the record. It cannot be said that the statements testified to by the boy constituted a conversation or transaction between appellant and deceased. It is not contradictory to appellant's contention that deceased gave her the money.

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The boy testified to no conversation wherein either party said anything whatever regarding the ownership of the money or relative to the giving of the money by the deceased to appellant. He testified to the existence of the money in the possession and control of the deceased. Her testimony related to a transaction whereby she became the owner of the money. The boy testified to no such transaction, and the only information we have that such a conversation took place is the testimony of the appellant. The fact that the conversation or transaction relied upon immediately followed the conversation testified to by the witness called by the administratrix does not render admissible testimony which otherwise would be barred. Appellant was competent to testify to the transaction and conversation mentioned in the boy's testimony, but she could go no further. *Dickenson v. Columbus State Bank*, 71 Neb. 260. The court did not err in striking the testimony. Neither does the evidence support appellant's contention regarding the \$214, and we recommend that the judgment be affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

IN RE ESTATE OF CHRISTOPHER O'BRIEN.

MARGARET O'BRIEN, ADMINISTRATRIX, APPELLANT, v. D.
W. SPERLING, GUARDIAN, APPELLEE.

FILED NOVEMBER 21, 1907. NO. 14,947.

1. **Guardian and Ward: LOANS.** Section 27, ch. 34, Comp. St. 1907, requires a guardian to apply to and receive from the county court an order authorizing him to loan the funds of his ward. If he loans his ward's funds without such authority, and a loss ensues, he is liable therefor.

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2. ———: ———. The personal direction and supervision of the county judge in making loans for a guardian is not equivalent to an order of the court authorizing the loans.
3. ———: ———: ANNUAL REPORTS: APPROVAL. The approval by the county court, without notice to those interested, of the usual annual reports of a guardian, wherein he reports loans of his ward's funds without an order of the court, is not equivalent to an order of the court authorizing the guardian to make such loans.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed with directions.*

Allen G. Fisher and F. O'Linn, for appellant.

A. W. Crites, contra.

GOOD, C.

This is an appeal involving the final settlement of a deceased guardian's account. It originated in the county court of Dawes county, Nebraska. Christopher O'Brien was the guardian of two minors. Several years after his appointment he died, and his widow was appointed administratrix of his estate. D. W. Sperling was appointed as guardian of said minors to succeed to the trust of the deceased guardian O'Brien. At the instance of the newly appointed guardian, the administratrix of the deceased guardian was cited by the county court to make a final report on behalf of the deceased guardian. Such a report was filed, and thereupon exceptions were taken to certain items of credit in the report. Hearing was had in the county court, and the final report made by the administratrix was in all things approved, and the exceptions were overruled. Thereupon the new guardian, without giving any appeal bond, appealed to the district court. There the administratrix of the deceased guardian moved to dismiss the appeal, because no undertaking for appeal had been given by the guardian. This motion was overruled. No new pleadings were filed in the district court, and a hearing was had in the district court upon the report and ex-

ceptions that had been filed in the county court. The district court sustained certain of the exceptions and overruled others. The administratrix of Christopher O'Brien, deceased, appeals to this court.

The first contention is that the district court was without jurisdiction, because the guardian appealing from the county court did not enter into an appeal undertaking, and that the district court erred in refusing to dismiss the appeal for the failure to give such an undertaking. Section 44, ch. 20, Comp. St. 1905, relating to appeals from the county court, among other things, provides that an executor, administrator, guardian or guardian *ad litem* shall not be required to enter into any bond in order to enable him to appeal. The appeal in this case was on behalf of the estate of the minor wards, and the guardian was appealing in his trust capacity, as guardian, and under this section of the statute no bond was required in order to permit him to appeal. The objections that the district court was without jurisdiction and that it erred in refusing to dismiss the appeal are without merit.

The next question, and the principal one in issue in the case, arises out of this state of facts: Christopher O'Brien, the first guardian, soon after his appointment received a considerable sum of money for his wards. Among other investments that he made with the trust funds were two loans upon real property in the city of Chadron. One was made to Shelton for \$750, and the other to Chapin for \$500. The one for \$500 to Chapin was secured by a third mortgage upon hotel property, and the one to Shelton for \$750 was secured by a first mortgage upon a building called the "Packing House," but there seems to have been a considerable amount of unpaid taxes upon this property. No formal application was ever made to the county court to authorize these investments, and no order of the county court was ever made directing or authorizing the investment of the trust funds in these mortgages. All the mortgages on the Chapin property were foreclosed in one action, but the property failed to bring sufficient to pay more than

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the first mortgage, and there was a total loss of the trust funds loaned upon the Chapin property. Interest was paid for a time on the Shelton mortgage, but the mortgagors failing to make further payments, O'Brien procured a conveyance of the premises to him as guardian. Several items of expense for insurance, taxes and repairs upon this property were incurred, all of which items, together with said loans, were in the credit column of the final report of the guardianship filed by the administratrix of the deceased guardian. The newly appointed guardian made objection to the items of the two loans above mentioned and of the expenses incurred for taxes, insurance and repairs upon the property so taken over, and took exceptions thereto. The district court disallowed these items upon the ground that the loans had never been authorized by the county court, and ordered that the account be restated so as to charge the former guardian in said account with each of the items of \$750 and \$500 for the loans, and the items of expense, aggregating \$107.36, together with interest thereon.

The appellant contends, first, that no order of the county court is necessary to authorize a guardian to invest trust funds, that it is only necessary that he should act with good faith and prudence in making investments, and that, if a loss results from loans thus made, without fault of the guardian, he is not chargeable with such loss; secondly, that the county judge orally and personally directed and supervised the making of the loans in question, and that the guardian reported the loans in his annual reports, which were approved by the court, and that these acts were equivalent to a prior order of the county court to make the loans in question. In many jurisdictions it has been held, in the absence of a statute requiring it, that a guardian is not required to apply to the court making his appointment for authority to invest funds, and that he will be protected if he acts in good faith and exercises that caution and prudence that is usually exercised by ordinarily prudent persons. In those states where a statute requires the guard-

ian to apply to and obtain the authority of the court before making the investment, it has been held that the guardian is liable for a loss if he makes the investment without proper authority, and that good faith and care and prudence will not protect him.

Section 27, ch. 34, Comp. St. 1907, is in the following language: "The courts of probate in their respective counties, on the application of a guardian, or of any person interested in the estate of any ward, after such notice to all persons interested therein as the court shall direct, may authorize or require the guardian to sell and transfer any stock in public funds, or in any bank or corporation, or any other personal estate or effects held by him as guardian, and to invest the proceeds of such sale, and also any other moneys in his hands, in real estate or in any other manner that shall be most for the interest of all concerned therein, and the said court may make such further orders and give such directions as the case may require for managing, investing, and disposing of the estate and effects in the hands of the guardian." This section of the statute was before this court for construction in the case of *Hendrix v. Richards*, 57 Neb. 794. It was there held that a transfer of the personal property of a minor by a guardian must be authorized or directed by the proper court of probate. In that case a guardian, who held a note and mortgage for his ward, resigned the guardianship, retaining the note and mortgage, and delivered to his successor a sum of money in lieu of the note and mortgage as a consideration therefor. A subsequent owner of the land mortgaged paid the amount of the mortgage to the former guardian, but previous to such payment had caused the probate records to be searched and found that no order had been made authorizing the sale and transfer of the note and mortgage. It was held, in an action by the administrator of the deceased minor to foreclose the mortgage, that the foregoing facts constituted no defense. A careful examination of this section of the statute, above quoted, shows that it applies to the invest-

ment of any moneys in the hands of the guardian in real estate or in any other manner that shall be most for the interest of all concerned therein. If it is necessary for a guardian to have the authority of the probate court to make a valid sale or transfer of any of the personal property of his ward, then it would seem, under this section of the statute, to be necessary to have the authority of the county court in order to invest the funds of his ward's estate.

The evidence discloses that the county judge advised and acted for the guardian in making the loans in controversy, that he made the abstracts of title and drew the papers. Appellant contends that this is sufficient compliance with the statute. It is apparent that the action of the county judge in advising the loans was based upon his own knowledge and his own judgment as to the value of the property and the desirability of the loans, and possibly might have been influenced by the fact that he was receiving compensation for performing this work. Reference to the section of the statute above quoted will disclose that it was the intention of the legislature that there should be a hearing before the court and notice given to those interested, that an investigation as to the desirability of the proposed loans should be had before the court, that evidence might be taken upon this question of those qualified to give an opinion, and that the court after hearing the evidence should render a judicial act in directing or refusing the order to make the loans. In the present instance, the county judge acted as a broker for the guardian and did not act in a judicial capacity, and his personal acts in advising and directing the loans are not equivalent to a judicial order. A county judge should not counsel or advise any litigant in his court in any matter which the statute commits to him for judicial action.

The question next arises as to whether or not the approval by the court of the annual reports of the guardian, in which were disclosed the loans in controversy, is equivalent to a prior authorization by the court. It appears

that the reports filed were the usual annual reports of the guardian, that no hearing was had upon such reports, that no investigation was made, and that no notice was given to any one interested in the estate of the filing of the reports or the approval thereof by the court. We do not wish to be understood as holding that the court might not, upon a proper application and hearing thereon after due notice, make such an order as would be equivalent to a prior authorization. But, so far as appears in this case, the approval of these reports was *ex parte*. It has been held by this court in *Bachelor v. Schmela*, 49 Neb. 37, that a substantial difference exists between the final settlement of the accounts of an executor, administrator or guardian and those made annually or at stated periods. A final settlement is made pursuant to notice to persons interested in the estate, is in the nature of a judgment, and is conclusive as to all matters included therein until reversed or set aside in a direct proceeding, or impeached on account of fraud. But an interlocutory, *ex parte* accounting is subject to re-examination so long as the administrator's accounts remain unsettled. The approval of the guardian's report was, therefore, not equivalent to a prior authorization.

The action of the district court in ordering the guardian's account surcharged with the amounts of the loans should be affirmed. But we think that complete justice requires that the guardian's account should be surcharged with the items of the two loans, together with interest thereon from the time they were made at 7 per cent. per annum, and his account should be surcharged with the items of expense for taxes, insurance and repairs upon the property, together with interest thereon at the rate of 7 per cent. per annum from the date of each item. Upon the other hand, it appears from the record that the guardian collected some interest upon these loans and some rents from the property, with which he is charged in the account. From an examination of the record we are unable to ascertain the exact amount of these items. He is

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entitled to have the present account credited with the amount of these items. It would be neither equitable nor just that the estate of the minors should hold the guardian liable for the amount of these loans and the interest thereon, and at the same time retain any of the benefits arising from these loans.

We recommend that the cause be remanded to the district court, with directions to ascertain the amount of the items of rent and interest, with which the guardian stands charged in the account, and to enter judgment in conformity with the views herein expressed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to the district court to ascertain the amount of the items of interest and rents and to enter judgment in conformity with this opinion.

REVERSED.

THOMAS E. HAURIGAN, APPELLEE, V. CHICAGO & NORTH-
WESTERN RAILWAY COMPANY, APPELLANT.*

FILED NOVEMBER 21, 1907. No. 14,948.

1. **Pleading: CONSTRUCTION.** A petition which seeks a recovery for several breaches of one contract states but one cause of action, and is not subject to a motion to separately state and number.
2. **Carriers: DISCRIMINATION: MISTAKE.** Section 10009, Ann. St., does not render void a contract between a railroad company and a shipper to transport merchandise for less than the usual and regular freight rate, where such rate has been agreed to by mistake of the railroad company without intending any discrimination against other shippers. Where such contract had been entered into and the freight transported in pursuance thereof, if the railroad company compels the payment of freight charges in excess of the contract rate, such excess may be recovered by the shipper.

* Rehearing allowed. See opinion, p. 139, *post*.

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3. **Appeal: EVIDENCE: HARMLESS ERROR.** Rulings on the admission of evidence examined, and *held* not to be prejudicially erroneous.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

B. T. White, C. C. Wright and B. H. Dunham, for appellant.

Grant G. Martin and R. J. Stinson, contra.

GOOD, C.

Plaintiff brought this action against the defendant to recover damages for a breach of contract. From a judgment in favor of the plaintiff the defendant appeals.

Plaintiff's cause of action grows out of the shipment of a car-load of sweet potatoes from Fremont to Hastings. He alleges in his petition that he made an oral agreement with the defendant to transport a car of potatoes from Fremont to York by way of David City, with a stop-over privilege at the latter city, for which he was to pay the sum of \$24 freight and \$5 for the privilege of stopping at David City to unload a portion of the potatoes; that the defendant wrongfully billed the car to David City, instead of to York; that at David City he was compelled to pay the sum of \$24 before being permitted to open the car and unload a portion of the potatoes, and was informed that he would have to pay the additional sum of \$24 to transport the remainder of the potatoes to York. The agent of the defendant further advised the plaintiff that the rate to Hastings was the same as to York, and that Hastings, being a larger city, would be a more desirable market for the potatoes. Thereupon the plaintiff consented to have the car rebilled to Hastings, instead of to York. By an error of the defendant's agent the potatoes were sent to York, instead of to Hastings, and, when plaintiff reached Hastings some days later, he ascertained, upon inquiry from the defendant's agent, that the car had not arrived. Some delay occurred before the potatoes could be for-

warded to Hastings. When they reached Hastings, the plaintiff was compelled to pay, as freight, the sum of \$37.50 before being permitted to enter the car to receive them. The plaintiff also avers that he had cleated the end doors of the car so as to hold them open for the purpose of permitting air to circulate through the car and thereby prevent the potatoes from heating and spoiling, and that the defendant, its agents or employees, wrongfully closed the end doors of the car so that no air could circulate through it, and that, by reason of the wrongful closing of the doors and the wrongful and negligent delay in the transportation of the potatoes to Hastings, the potatoes became heated, damaged and spoiled. Defendant first moved to require the plaintiff to separately state and number his causes of action. This motion was overruled. Thereafter the defendant answered, admitting that it collected the charges for freight, as alleged by plaintiff, and averred that the charges for freight collected were the rates and charges in force and effect at the time when the said consignment of potatoes was shipped, and that they were the regular rates and charges then demanded and collected by the defendant from all persons and the public generally for like and contemporaneous service, and that the arrangement and agreement between the agent of the defendant and the plaintiff for the transportation of the said car of potatoes for a less sum was unlawful, void and unenforceable under the laws of the state, as constituting an unjust discrimination in favor of the plaintiff, and alleged that the injuries and damages sustained were due to the inherent nature and tendency of the potatoes to rot and decay, and to the negligent acts of the plaintiff, and not to any fault or negligence of the defendant, and denied all the other allegations of the petition.

The first assignment of error relates to the overruling of the defendant's motion to require the plaintiff to separately state and number his causes of action. Whether this was error depends upon whether more than one cause of action is set forth in the petition. An examination of

the allegations convinces us that the damages sought to be recovered arise out of a single contract, and that all the acts complained of are breaches of that contract. It is true that the original contract provided for the transportation of the potatoes to York, with a stop-over privilege at David City, but by mutual consent the original contract was changed so as to make the city of Hastings the final destination, instead of York. The contract provided for the transportation for a specified sum to the city of York. The agent of the defendant at David City informed the plaintiff that the rate to Hastings would be the same as to York, so that by mutual consent the contract was modified and changed to make Hastings the final destination. As we view it, it is the same as if the contract had originally been made at Fremont to ship the potatoes to Hastings, with a stop-over privilege at David City. The law imposes upon the defendant the duty of transporting freight without unnecessary delay and to use due care to transport it safely. This duty and obligation imposed by law became and was a part of the contract. This court has held in the case of *Denman v. Chicago, B. & Q. R. Co.*, 52 Neb. 140, that an action for damages occasioned by delay in shipping freight may be grounded on the contract. The same would undoubtedly be true of an action to recover damages for negligent handling and caring for the merchandise while being transported. All of the damages sought to be recovered arise from the breach of the one contract, and constitute but separate items of one cause of action. We think the rule of law applicable to the case is set forth in Bliss, Code Pleading (2d ed.), sec. 118, as follows: "It is a rule that a cause of action—as, one springing from a single contract—cannot be so split as to authorize more than one action; and the same rule would make it improper to so divide a single cause of action, by separate statements in one complaint, as to show more than one cause of action. * * * 'All damages arising from a single wrong, though at different times, make but one cause of action; and all debts and demands already due

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by the same contract make one entire cause of action.'” The rule is thus stated in Maxwell, Code Pleading, p. 256: “When the causes of action all grow out of and are a part of the same wrong, they are but separate items of damage, and not different causes of action.. Thus, where sheep were sold upon the representation and warranty that they were sound, but were in fact all affected with the hoof-rot, but the plaintiff, relying upon the defendant’s representations and warranty, turned the sheep so purchased into his field with a large number of other sheep, whereby they became diseased, and the pasture injured, it was held that there was but one cause of action, although there were a number of items of damage”—citing the case of *Wilcox v. McCoy*, 21 Ohio St. 655. The motion to separately state and number was properly overruled.

The second ground urged for a reversal of the case is that the rate agreed upon for the shipping of the car of potatoes was less than the regular rate charged to the public, and the contract was therefore, under the statutes of Nebraska, void, and no action for the breach thereof could be maintained. Section 10009, Ann. St., among other things, provides: “No railroad company within this state shall * * * directly or indirectly charge to or receive from any person or persons, or association or corporation any greater or less sum, compensation, or reward than is charged to or received from any other person or persons, association or corporation for like and contemporaneous service in the receiving, transporting, storing, delivering or handling of freights.” Section 10010 provides that any railroad company, officer or agent wilfully violating any of the provisions of this act shall be liable to the party injured for all damages sustained, and also be liable to a severe penalty for the violation of the law. The defendant contends that section 10009 makes it unlawful for the railroad company to transport freight for a less sum than the regular rates charged to the public generally, and that any contract so to do is absolutely void. There are many eminent and respectable authorities that hold to this

doctrine and have so construed statutes very similar to our own. The doctrine is not without sound reason to support it. Upon the other hand, there are strong reasons to hold the railroad company to its contract as made. Our statutes do not require that the railroad company shall publish its tariff sheets, and, even if they did so, the classifications of freight are so numerous and complex that the ordinary and occasional shipper will be unable to ascertain the freight rate upon any commodity, except by applying to the company or its agents for information. If one contemplates a shipment of merchandise and applies to and receives from the railroad company information as to the rate, he then has his opportunity to elect whether he will ship or not. To say that a railroad company may, by mistake or inadvertence, quote a less rate than the usual or regular rate, and thereby induce a person to ship merchandise, and then to permit the railroad company, after the shipper has been placed in a position where he cannot retrace his steps, to collect the usual or greater rate, would be to cause the innocent to suffer injury for the negligent or wrongful act of the company, and to permit the company to profit by its own misconduct. If the railroad company, by negligence or mistake, may induce one to ship goods and merchandise by quoting him a less rate than the regular rate, and then collect the full rate, we see no reason why it might not wilfully and intentionally quote a lower rate for the purpose of securing the shipment, and then exact the regular rate. We do not think it is sound policy to permit the innocent to be thus lured to their injury and possible financial ruin by such methods. We think the rule is that, where, by mistake or inadvertence, the company has induced a person to ship goods by quoting a less rate than the regular rate, it should be held liable for the consequences. The object of the statute was to prevent discrimination. Under the law no penalty attaches to the railroad company unless the violation was wilful. The loss for the fault or mistake of the company should be visited upon it, and not upon the innocent party. The

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view here expressed finds support in the case of *Missouri P. R. Co. v. Crowell Lumber & Grain Co.*, 51 Neb. 293, *Illinois C. R. Co. v. Seitz*, 214 Ill. 350, and 2 Hutchinson, Carriers (3d ed.), sec. 594. In the latter authority, commenting on the last case cited, it is said: "This rule is at variance with the decisions under the interstate commerce act, but it is more in accordance with justice and reason, and does not make the state acts swords of offense against the shipper as is the interstate commerce act in that respect." In *Bayles v. Kansas P. R. Co.*, 13 Colo. 181, 22 Pac. 341, it was held, under a constitutional provision forbidding "undue or unreasonable discrimination" by railroad companies in freight charges, a contract by a railroad company to carry freight at a rate less than its published schedule is not void as being unjust discrimination and against public policy in the absence of evidence that such special rate is an exclusive privilege. We think it was the evident intention of the legislature, by the enactment of the statutes referred to, to prevent a railroad company from making unjust discriminations, and that it was not the legislative intent or purpose to permit a railroad company to quote a lower rate than the usual or regular rate, and thereby induce a person to ship freight, and then use the statute as an instrument to enable it to collect a greater rate. It was not the intention of the legislature to permit a railroad company, by its negligent and wrongful acts, to injure another to its own profit. We are of the opinion that the plaintiff, notwithstanding the statute, was entitled to recover the freight charges paid in excess of the contract rate.

Appellant contends that there was error in the admission of certain evidence as to the amount of damages sustained. The plaintiff was permitted to answer the following question: "Q. Now, taking all these matters into consideration, you may state what the difference in the value of the potatoes would be if they had arrived in Hastings in good condition. A. \$250." It will not be contended that the admission of this evidence was not erroneous, but,

in view of the fact that counsel for the defendant had previously examined the plaintiff upon his competency to testify, and had brought forth from him the fact that from 130 to 150 bushels of potatoes were spoiled, and that their market value was \$1.50 a bushel, which was not contradicted, and, in view of the fact that the total amount of recovery, including the excessive freight charges, was \$59, it cannot be said that the admission of this evidence wrought any prejudice to the defendant.

Appellant also contends that there was no competent proof that the end doors of the car were closed by the defendant or its employees. The undisputed evidence shows that the doors were cleated open by the plaintiff before the car left David City, and that the doors were closed and fastened when he first saw the car in Hastings. During the interim the car had been in the control of the defendant and its employees, and it was responsible for the proper care of the car and care of the merchandise therein. We do not think other evidence upon this point was required of the plaintiff.

We find no reversible error in the record, and recommend that the judgment of the district court be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed June 26, 1908. *Affirmed on condition:*

1. **Carriers: DISCRIMINATION: MISTAKE.** Under section 10009, Ann. St., a contract between a railroad company and a shipper to transport merchandise for a less rate than that usually and regularly charged to others for similar and contemporaneous service is void, even though such rate was agreed to by mistake; and an action will not lie against the carrier for a breach of the contract, if it exacts the regular rate.
2. **Cases Disapproved.** The second paragraph of the syllabus in this case, *ante*, p. 132, overruled, and the holding in *Missouri P. R. Co. v. Crowell Lumber & Grain Co.*, 51 Neb. 293, disapproved.

Good, C.

This is a rehearing of the case reported *ante*, p. 132. A statement of the facts will be found in the former opinion. The rehearing was sought and granted upon the propositions laid down in the second paragraph of the syllabus to that opinion. It was there held that section 10009, Ann. St., did not render void a contract between a railroad company and a shipper to transport merchandise for less than the usual and regular freight rate, where such rate has been agreed to by mistake of the company without intending any discrimination against other shippers. It was also held that, where such contract was made and freight transported pursuant thereto, if the railroad company compelled payment of freight charges in excess of the contract rate, such excess could be recovered by the shipper in an action for breach of the contract. Section 10009, Ann. St., so far as the same is material to a consideration of this case, is as follows: "No railroad company within this state shall * * * directly or indirectly charge to or receive from any person or persons, or association or corporation any greater or less sum, compensation, or reward than is charged to or received from any other person or persons, association or corporation for like and contemporaneous service in the receiving, transporting, storing, delivering or handling of freights." Section 10010, Ann. St., provides severe penalties for any railroad that shall violate any of the provisions of the act, and makes it liable to the party injured for all damages sustained. In the present case the rate was fixed by inadvertence and mistake at a less rate than the regular charges made to other persons and to the public for like and contemporaneous services. But the mistake was discovered by the railroad company before the charges were collected, and it then exacted the full regular rate before it would deliver the freight to the consignee. The action was to recover for a breach of the contract. In the former opinion it was held that, because

the contract was entered into by mistake, and because there was no intent or purpose to discriminate, the contract was not void as being in conflict with the provisions of the statute above quoted, and that the shipper in such an action could recover any excess of the contract rate which was collected by the railroad company.

It is a familiar rule of statutory construction that the court should consider the evil sought to be prevented, and ascertain and give effect to the legislative intent. There can be no doubt that the evil aimed at by this legislation was the unfair and unjust preference and advantage which accrued to favored shippers by rebates and freight rates lower than those given to other shippers. The purpose of this legislation was to put a stop to and make unlawful any discrimination in freight rates. The legislature evidently deemed it wise to prohibit any discrimination, and to say that all shippers shall be placed upon an absolute equality so far as freight rates are concerned. The statute provides that the railroad company shall not be permitted to *receive* from any person or persons a greater or less sum than is received from other persons. If the railroad company, after discovering the mistake, had received only the contract rate, which was less than the usual and regular rate charged to the public generally and to other persons for like and contemporaneous service, it would have done so knowingly and wilfully, and it would thereby have rendered itself liable to the penalties provided by section 10010, *supra*. This provision and the effect thereof were overlooked in the former opinion. The result of that holding would be to require the railroad company to wilfully violate the statute and render itself liable to the penalties therein provided.

The provisions of section 10009, above quoted, are very similar to the provisions of the second section of the interstate commerce act as it originally existed, and as amended by the Hepburn act of June, 1906. That section has frequently been before the federal and state courts.

for interpretation. Construing that act, the supreme court of Kansas, in the case of *Chicago, R. I. & P. R. Co. v. Hubbell*, 54 Kan. 232, said: "The sole question to be considered in this case is whether the plaintiff, having obtained, through a mistake of a clerk of the St. Joseph, St. Louis & Santa Fe Company, a rate on shipments of coal \$1 a ton below the customary rate, can enforce a contract giving him such special rate against the plaintiff in error, which received and transported the coal, and paid to the connecting company its charges without notice of any special agreement. * * *. The claim of the plaintiff below rested solely on his special contract, and he now urges that he will be subjected to a financial loss by this operation if his special contract is not enforced. He also urges that, having been induced to make the shipment by the agent of the railroad company, if the rate quoted him was a mistake, the company rather than he should suffer for it. * * *. We think the question as to whether or not the plaintiff knew of the existence of the joint tariff at the time he shipped the coal is wholly unimportant. There was an established rate governing all shipments. * * *. Under the act of congress, all contracts discriminating either against or in favor of any shipper are unlawful, and the persons making such contracts on behalf of the corporation are liable to punishment. It was the plaintiff who was seeking to enforce the unlawful contract. * * *. The contract, being in violation of the express provisions of the law, was utterly void between the immediate parties to it." In *St. Louis & S. F. R. Co. v. Ostrander*, 66 Ark. 567, 52 S. W. 435, it was held that, where a lower rate than the published rate was quoted by a railway company, the contract was illegal and could not bind the company whose agent made the rate, and that it is immaterial whether the rate was made knowingly or not. It was there intimated that, if any action at all existed, it was against the company for wrongfully misrepresenting the rate. In the case of *Savannah, F. & W. R. Co. v. Bundick*, 21 S. E. 995

(94 Ga. 775), it is said: "Inasmuch as the interstate commerce act prohibits not only contracting for, but also collecting, a less rate of freight on interstate shipments, * * * a common carrier * * * is not precluded from collecting from a shipper the full schedule rate because, by mistake, a less rate was named to him by the carrier at the point of shipment, and also inserted in a bill of lading signed both by the carrier and the shipper, no fraud or wilful deception having been practiced or attempted. On discovery of the mistake, after the shipment, but in time to correct it at the point of destination, it may there be corrected by the exaction of the full schedule rate." In this case the court further said: "It makes no difference whether Bundick was or was not ignorant that the rate named to him was an unlawful one. Under no circumstances would he be entitled to the benefit of a rate which was denied to other customers. To so hold would be in the very teeth of the statute, and would utterly defeat its purpose to prevent just such discrimination." Other cases announcing practically the same doctrine are the following: *Missouri, K. & T. R. Co. v. Bowles*, 1 Ind. Ter. 250, 40 S. W. 899; *Southern R. Co. v. Harrison*, 119 Ala. 539, 24 So. 552; *Houston & T. C. R. Co. v. Dumas*, 43 S. W. (Tex. Civ. App.) 609; *Bullard v. Northern P. R. Co.*, 10 Mont. 168; *Kizer v. Texarkana & Ft. S. R. Co.*, 66 Ark. 348, 50 S. W. 871; *Myar v. St. Louis S. W. R. Co.*, 71 Ark. 552, 76 S. W. 557; *Southern R. Co. v. Wilcox & De Jarnette*, 99 Va. 394, 39 S. E. 144; *Ward v. Missouri P. R. Co.*, 158 Mo. 226, 58 S. W. 28. The United States supreme court has also taken a similar view of the interstate commerce act, in the case of *Texas & P. R. Co. v. Mugg*, 202 U. S. 242. It was there held that a common carrier may exact the regular rate for an interstate shipment, although a lower rate was quoted by the carrier to the shipper, who shipped under the lower rate so quoted. This doctrine was reaffirmed in *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, and *Texas & P. R. Co. v. Cisco Oil Mill*, 204 U. S. 449.

A contrary construction was placed upon the second section of the interstate commerce act by this court in the case of *Missouri P. R. Co. v. Crowell Lumber & Grain Co.*, 51 Neb. 293. The former holding in the instant case was largely induced by the construction placed upon the interstate commerce act in the case last mentioned, together with the fact that it seems abhorrent to one's sense of fairness and justice that a carrier should escape liability where it either negligently or wilfully quotes to a shipper, who is ignorant of the regular rate, a less rate, and thereby induces him to make a shipment that he would not otherwise make, and then exacts of the shipper the regular rate to his financial loss and possible ruin. The contract seems to be clearly one for a less rate than that usually and regularly charged to other persons for similar and contemporaneous service, and would be in direct violation of the statute. To hold otherwise would be to defeat the very object of the statute, which was to prevent the discriminations and preferences among shippers. After a careful consideration of the subject, we think the better view is that the contract, in so far as it sought to fix a rate less than the regular rate, was void. If the action in *Missouri P. R. Co. v. Crowell Lumber & Grain Co.*, *supra*, was based upon a breach of a contract, as it appears to have been, it ought no longer to be followed as a precedent, and the second paragraph of the syllabus in this case, *ante*, p. 132, should be disapproved and overruled.

The recovery in this case included other items than the difference between the contract rate and the regular rate. This difference in rates, in this instance, amounted to \$32.50, and that item is included in the judgment rendered for the plaintiff. To this extent the judgment is erroneous.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for a new trial, unless the appellee enters a remittitur of \$32.50 within 30 days of the date hereof, and, if such remittitur

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is entered within that time, the judgment of the district court should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that, if the plaintiff shall enter a remittitur of \$32.50 in this court within 30 days, the judgment of the district court shall be affirmed, and that, if the plaintiff shall fail to enter such remittitur within 30 days, said judgment shall be reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

W. IRVING FISHER ET AL., APPELLEES, V. OLIVER W.
FISHER ET AL., APPELLANTS.

FILED NOVEMBER 21, 1907. No. 14,962.

1. **Wills: DEVISE: CONDITION PRECEDENT.** A devise in a will in the following language: "In case my said son Oliver shall keep, care for and support me during the remainder of my life, as a consideration therefor, I give, devise and bequeath to my said son Oliver the south half, * * * but if my said son shall fail to keep, care for and support me during all of the remainder of my life, said south half * * * shall become a part of the residue and remainder of my estate"—*held* to be a devise upon a condition precedent and requiring substantial performance to vest title in the devisee.
2. —: **CONSTRUCTION.** A will should, if possible, be construed so as to give effect to each and every part thereof.
3. —: **WORDS OF LIMITATION.** Unless a different intention is apparent, words of limitation in a devise will be given their usual and ordinary meaning.
4. —: **CONDITION PRECEDENT: WAIVER.** As a general rule, waiver of performance of a condition precedent to the vesting of a devise must be shown either from the will or a codicil.
5. —: —: **NONPERFORMANCE.** Nonperformance of a condition

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that must be performed during the life of the testator is not excused by devisee's ignorance of the condition.

6. Evidence examined, and held insufficient to show substantial performance of the conditions of the devise.
7. Partition: TRIAL. In an action of partition, where the defendant answers, claiming title in himself, and waives a jury and participates in a trial of all the issues to the court without objection, he will be held to have waived any right he may have had to have the title first determined.
8. ———: WILLS: JURISDICTION. The district court has jurisdiction in an action of partition to construe a clause in a will determining the rights of the parties to the land under the will.

APPEAL from the district court for Dakota county:
GUY T. GRAVES, JUDGE. *Affirmed.*

W. P. Warner, E. R. Bevens and Shull, Farnsworth & Sammis, for appellants.

Wright, Call & Sargent and John V. Pearson, contra.

GOOD, C.

James Oscar Fisher, a resident of Dakota county, Nebraska, died testate, leaving him surviving seven children. This action was instituted by six of said children and their spouses against the remaining child and his spouse to partition 160 acres of land in said county disposed of by the will of said testator. There is no controversy, except as to one eighty-acre tract. The plaintiffs contend that the 80 acres in controversy were devised to all the children in equal shares under the tenth, or residuary, clause of the will. The defendant answered, and claimed the 80 acres in controversy in fee under the sixth clause of the will, wherein it was devised to the defendant Oliver W. Fisher upon certain conditions, performance of which was alleged by the defendants. Plaintiffs had judgment for partition, and the defendants appeal.

The controversy in this case largely hinges upon the interpretation to be given to the sixth paragraph of the will of James Oscar Fisher, and particularly to that

portion of said paragraph which relates to the 80 acres in controversy. The rule is general that in interpreting or construing a will the great object is to ascertain, if possible, the testator's meaning and intention, and, if lawful, to give effect thereto. In arriving at an understanding of the intention of the testator and the meaning of the language used in his will, it is the duty of the court to take into consideration all the facts and circumstances surrounding the testator at the time of the making of the will. In order, therefore, to get a clear understanding of the conclusions, which will hereafter be stated, we will first set forth the salient facts as disclosed by the record.

James Oscar Fisher was 74 years of age at the time of his death, on October 7, 1902. The will was made in September, 1900. Testator died possessed of 480 acres of land, and of personal property of the value of about \$9,000. He had resided upon the land in Dakota county for a great many years previous to his death. His wife died in 1889. His family consisted of four daughters and three sons, Oliver being the youngest child, and 11 years of age at the death of his mother. The daughters in their turn, after the death of their mother, took charge of the household affairs of their father until they were all married. Then one of the married daughters with her husband occupied the home jointly with the father until a few months before his death; when the youngest son, Oliver, was married, and he and his wife made their home with his father, she having the management of the household affairs. The testator was a man of more than ordinary intelligence, and had been admitted to the bar. He was a man of robust health until the year 1898, when he suffered a stroke of paralysis, from which he was confined to his bed for a short time, and was thereafter afflicted with the disease called "creeping paralysis." From the effects of his illness he became slightly crippled, and somewhat enfeebled, and performed no active work after the year 1898. It appears that he had several slight "strokes" or attacks, from time to time, which temporarily disabled

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him. After his first stroke of paralysis he was sensitive to the extremes of temperature. In cold weather he sometimes became chilled and benumbed, and his limbs required rubbing to restore the circulation. In hot weather he sometimes was so affected by the heat that he had to be assisted to a chair or other place of repose. In the main, however, his health was good, and he was able to go about alone; hitched up and unhitched his horse; frequently drove to Dakota City, and sometimes to Sioux City, apparently on an average of two or three times a week; frequently visited his friends in the neighborhood unaccompanied, and made trips by railway to visit his children; and at one time went to Hot Springs for treatment, staying several weeks and being unattended by any member of his family.

Oliver W. Fisher during all of his life had lived and made his home with his father, and, after the death of his mother, occupied the same room and slept with his father until May, 1902, when Oliver was married. He personally attended to the wants and needs of his father, particularly at night, rubbing his limbs when he became cold, assisting his father at times in changing his clothing, particularly his underclothing and shirts, and in lacing his shoes, and on a few occasions, for a day or two at a time, the father was unable to control the action of his bowels and kidneys, and Oliver attended to his needs and wants in that respect. Generally he hitched up the horse for his father and afforded him such care as would be expected from a dutiful son.

In September, 1900, while the father was ill and confined to his bed, he made a will, which was drawn by Judge Evans of Dakota City. Twelve days later he made another will, also drawn by Judge Evans, which was admitted to probate, and now requires interpretation in this action. By the provisions of this will he devised 80 acres to each of his three sons, and an additional 80 acres conditionally to Oliver. Another 80 was devised to two daughters jointly, and still another 80 to all his children

in equal shares. Substantial bequests were made to each of his children. The sixth clause of his will is in the following language: "Sixth, I give, devise and bequeath to my beloved son, Oliver W. Fisher, all my household furniture that shall remain after that portion thereof heretofore bequeathed to my said daughter Mary shall have been set aside and allotted to her. I also give, devise and bequeath to my said son Oliver my horse called 'Jim' and my mare called 'Coally' and the colt now running at her side; also the north half of the northeast quarter of section fourteen (14), township twenty-eight (28), of range eight (8) east, in Dakota county, state of Nebraska, and in case my said son Oliver shall keep, care for and support me during the remainder of my life, as a consideration therefor, I give, devise and bequeath to my said son Oliver the south half of the southeast quarter of section eleven (11), township twenty-eight (28) of range eight (8) east, in said Dakota county, but if my said son shall fail to keep, care for and support me during all of the remainder of my life, said south half of the southeast quarter of eleven (11) shall become a part of the residue and remainder of my estate and be disposed of as hereinafter provided, and my son shall have no claim against my estate for such care, keeping and support which shall not be fully paid for by the other portions of this bequest and devise." From this it will be observed that the south half of the southeast quarter of section eleven is devised to Oliver upon a condition that he should "keep, care for and support" the testator during the remainder of his life, and that, if Oliver should fail to "keep, care for and support" the testator during all the remainder of his life, then said tract of land should become a part of the residue of the estate, which was disposed of by the tenth clause of the will in equal shares to all his children. Under the sixth clause of the will Oliver was required to perform the conditions imposed during the lifetime of the testator. Performance was required before the vesting of the title. The devise was upon a condition precedent, and, unless there

was at least substantial performance of the conditions, no title to this eighty-acre tract ever vested in Oliver. *Burdis v. Burdis*, 70 Am. St. Rep. 825 (96 Va. 81), and note thereto; *Martin v. Ballou*, 13 Barb. (N. Y.) 122; *Mills v. Newberry*, 112 Ill. 123; note to *Nunnery v. Carter*, 78 Am. Dec. 231 (58 N. Car. 370); *Merrill v. Wisconsin Female College*, 74 Wis. 415.

Defendants contend that literal performance of the condition was never intended by the testator. In support of this contention they rely upon the fact that the testator never informed Oliver of the condition upon which the land was devised—and, in fact, it appears that none of the children had any knowledge of the contents of the will until after the death of their father—also, the fact that the testator, at the time of the making of the will, was possessed of ample property and had an income of about \$1,200 to \$1,500 annually, and that Oliver, at the time of the making of the will, was a single man, possessed of no property of any consequence. And it is urged that the testator had in mind, by the use of the words “keep, care for and support,” such personal attention as Oliver had been accustomed to bestow upon his father at that time. Upon the other hand, we must consider that the testator was a man of more than ordinary intelligence, and had been admitted to the bar, and presumably had knowledge of the meaning that is usually attached to the words contained in the will; also, the fact that the will was redrafted, and that it was drawn by an able and experienced lawyer, and that it was drawn only 12 days after the making of a previous will, showing that the testator had used care and caution in drawing his will and was desirous of having it exactly according to his wishes. To construe the will as contended for by the defendants would be to deprive the words “keep” and “support” of any use or effect in the will. It would be practically changing the clause so as to read, “to care for,” or “to take care of me.” It is a cardinal principle in the interpretation of wills that effect should be given to each and every portion thereof, if

possible, and, if it can be so construed as to give effect to all the language of the testator, such interpretation should prevail. If any significance is to be attached to the fact that the testator never informed Oliver of the provisions of the will, and that he never made any demand or request of Oliver for actual keep or support, we think it tends to support the view that the testator did not desire fulfillment of the condition, but preferred to let the 80 acres in question go under the residuary clause of the will. We think it probable that, at the time he drew the will, being confined to his bed and being a man of intelligence and knowing the nature of the disease with which he was afflicted, he probably reasoned that he was likely to become a helpless invalid, unable to manage his property or direct his affairs, and possibly unable to keep and support himself. With that contingency in view, he may have made provisions as therein stated as a consideration for the care, keep and support, which he anticipated would be furnished by Oliver; but, recovering from his attack within a few days and finding that his health permitted his managing and directing his own affairs, he was content to support and keep himself and let the property go to all his children in equal shares. It is evident that during the two years after the making of the will he was fully aware of the conditions, and knew that Oliver was not literally fulfilling them, and that he never took any steps to change or alter the will, presumably because he was satisfied to have the conditions not fulfilled and the property go to all the children.

The defendants contend that there was substantial performance of the conditions, because Oliver cared for and attended to the personal wants of the father and furnished him such things in the way of support as the father requested. In that behalf it may be stated that, at the time the will was made, one of the testator's daughters and her husband were living with and keeping house for the testator; that testator was furnishing, or supplying, the necessaries for the table, the fuel, and his clothing; that

Oliver furnished no part thereof, unless it was some occasional article of no consequence; that Oliver and the hired man were paying board to his father, and continued to do so until Oliver was married; that after Oliver was married he and his wife kept house, and Oliver and his father shared the expenses in about equal proportions for maintaining the household, which consisted of the father, Oliver, his wife, and the hired man. It will be seen that, although the father was only one-fourth of the number of the household, he was paying one-half of the expenses. At no time did Oliver furnish any clothing, or raiment, for the father. He did on a few occasions purchase medicines for his father, and paid for the nurse during the last illness of the testator, which lasted 11 days. Under these circumstances, we think Oliver's attempts to prove performance of the conditions fall far short of showing a substantial performance, and wholly fail to comply with the requirements imposed by the father's will.

Defendants further contend that the testator had a right to, and did, waive performance. It is doubtless true that the testator had a right to waive a performance of the conditions, but the only way that the waiver can be shown is by the will itself. We are aware that, in some instances, waiver of the conditions precedent has been held to occur. (*Clarke v. Berkeley*, 2 Vern. (Eng.) 719, was a case wherein the testator devised real estate in trust for the benefit of a daughter until her death or marriage, and in case she married with the consent of two of the trustees and her mother, then to convey unto her and her heirs, or to such person as she should appoint, but, if she died before marriage or married without such consent, then the trustees were to convey the lands to other uses. Subsequently to the making of the will the daughter, with her father's consent, married. After his death it was insisted that she could not take the property by the will, because the devise was upon a condition precedent that she should marry with the consent of the trustees and her mother, and that no such consent was had or could be had. It was

held that the marriage did not work a revocation of the devise, and that the conditions in the will that she should marry with the consent of the trustees and her mother were dispensed with by having the consent of the testator, which was more to be regarded than the consent of the trustees. In this case it is clear that the testator desired that his daughter should not contract an unfortunate marriage, and, anticipating that the marriage would not occur until after his death, he took steps to prevent an unfortunate marriage by requiring the consent of certain persons appointed by him. But, when he had the opportunity to, and did, exercise that supervision over the marriage of his daughter, he had accomplished all that could be accomplished through the agency of others. The object and the intention of his will had been complied with. Substantial compliance with the conditions had taken place previous to his death. But we cannot say, from anything that is in the will in the case at bar, that there was any intention or purpose of the testator to waive compliance with the conditions. As was well said in the case of *Bryan v. Bigelow*, 77 Conn. 604, 107 Am. St. Rep. 64: "The intent must in every case be drawn from the will, but never the will from the intent. 'So far as concerns the construction of a will, the question always is, not what the testator meant to say, but what is meant by what he did say.'"—citing *Weed v. Scofield*, 73 Conn. 670.

Defendants contend that Oliver's ignorance of the provisions of the will excuses nonperformance. It is admitted that the general rule is that ignorance of a condition precedent in a will does not excuse its nonperformance, but defendants contend that this has no application to an heir of a testator, who is devisee of an estate upon condition. This doctrine has sometimes been given effect to prevent an heir from being deprived of any part of his inheritance. In this case it will be observed that the testator had already provided for Oliver by an unconditional devise of 80 acres, and, in fact, the evidence discloses that the value of the property devised unconditionally to Oliver

was greater than that devised to any of the other children. We think the general weight of authority is to the effect that nonperformance of a condition precedent, or a condition that must be performed during the life of the testator, is not excused by ignorance of it. In the case of *Brennan v. Brennan*, 185 Mass. 560, the clause in the will construed was: "All the rest, residue and remainder of my property, both real, personal and mixed, I give, devise and bequeath to Francis J. Brennan to him and his heirs forever, provided that he shall take care of me and look after me while I live." The court held this to be a condition precedent, and that no estate vested in the devisee because he had not complied with the condition. The fact that he had no knowledge of the conditions until after the death of the testator was held not to change the rule. We reach the conclusion, therefore, that the 80 acres in controversy were devised upon a condition precedent which was never performed, and that no title ever vested in Oliver, and that the eighty-acre tract was therefore disposed of under the tenth, or residuary, clause of the will, by which it was bestowed in equal shares upon all the children of the testator.

Defendants further contend that the district court had no jurisdiction to hear and adjudicate the matters here in controversy, claiming that the action of partition will not lie by one out of possession against one in possession claiming title to the land. It is sufficient answer to say that neither the pleadings nor the evidence show that the defendants were in possession, and it is rather inferable that the possession of the premises was in the executors of the will. But whether or not they were in or out of possession, we think, makes no difference under the circumstances. Whatever right defendants might have had to have the right of title tried first was waived by the defendants asking for affirmative relief from the court, waiving a jury, and participating without objection in a trial of all the issues to the court. *Schimpf v. Rhodewald*, 62 Neb. 105; *Schick v. Whitcomb*, 68 Neb. 784.

The defendants next contend that the county court had original jurisdiction to hear and determine the questions at issue, and that the district court was without jurisdiction, except on appeal. In support of this contention they rely upon *Boales v. Ferguson*, 55 Neb. 565, *Reischick v. Rieger*, 68 Neb. 348, and *Youngson v. Bond*, 69 Neb. 356. We think a careful reading of these cases does not justify the inference drawn by the defendants. It is the rule, doubtless, that the county court has jurisdiction in an action by the executor to construe a will for the purpose of affording information to the executor for the administration of the estate, but the principal action here is to partition the land. The construction of the will is only incidental to the main relief sought. It is quite clear that the county court could not have jurisdiction in an action to partition the land, and, we think, it is likewise clear that it would not have jurisdiction of an action for the construction of a will between two or more heirs or devisees claiming title to the same tract of land. In *Youngson v. Bond*, *supra*, the commissioner writing the opinion quotes with approval from the case of *Branson v. Studabaker*, 133 Ind. 147, as follows: "As effective a practical test as can be found is supplied by the answer to the question: Is the effect of the judgment appealed from such as to divest one of the parties of title, or to invest one of them with title?" It cannot be gainsaid that the effect of the judgment construing the clause of the will in controversy is to determine that the defendants do not have absolute title to the land, but that all of the children of the testator owned the land in equal shares. We think it is clear that the county court did not have jurisdiction to construe the will as between the plaintiffs and the defendants for the purpose of determining the title to the land in controversy.

It follows that the judgment of the district court is right and should be affirmed, which we accordingly recommend.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion the judgment of the district court is

AFFIRMED.

JOHN MCMAHON, APPELLANT, V. SCHOOL DISTRICT ET AL.,
APPELLEES.

FILED NOVEMBER 21, 1907. No. 14,980.

1. **Schools and School Districts: CHANGE OF SCHOOL SITE.** Where the electors of a school district, in a motion to authorize a change in the schoolhouse site, designate the new location as the southeast corner of the northeast quarter of section 22, the failure to state the township and range in which the section is located does not render the location of the proposed site uncertain, when there is but one section numbered 22 in the school district.
2. ———: ———: Under sections 11036 and 11038, Ann. St., a school district may authorize the removal of the schoolhouse to a new site previous to the acquisition of the title to the proposed new site, and may thereafter, at a special meeting, authorize the acquisition of the title to the proposed site, but will have no right to remove the schoolhouse to the new site until the district has acquired title thereto.
3. ———: ———: **PRESUMPTIONS.** Where the electors of a school district by a motion authorize the acquisition of a new site for the schoolhouse, and in the description the site is located in the southeast corner of the northeast quarter of section 22, township 22, range 5, and it appears that the section described would be without the district, and that there is but one section 22 within the district, it will be conclusively presumed that the location referred to was on the section 22 within the school district.

APPEAL from the district court for Antelope county:
JOHN F. BOYD, JUDGE. *Affirmed.*

Fred H. Free, for appellant.

O. A. Williams, contra.

GOOD, C.

The appellant instituted this action in the district court against School District No. 66 of Antelope county and its

officers to enjoin them from removing the schoolhouse in said district to another site therein, and, from a judgment of dismissal, appeals to this court.

At its regular annual meeting, held on June 26, 1905, the following motion was carried by more than a two-thirds vote: "Moved and carried to move the site of the schoolhouse to the southeast corner of the northeast quarter of section 22." It will be observed that no township or range is mentioned. It is conceded that the district is composed of the south half of sections 13, 14 and 15, all of sections 22, 23 and 24, and the north half of sections 25, 26 and 27, in township 27, range 5. It will be further observed that there is but one section 22 within the district. It is conceded that at the time of this annual meeting the school district had not acquired a site in section 22, and that the officers of the district were not at that meeting authorized to procure a site. The appellant contends that the designation of the location was too indefinite, because it did not fix the township and range, and that the district had no authority to move the schoolhouse to section 22, because it had procured no site in that section on which to place the schoolhouse. As there was but one section 22 in the school district, we think it cannot be consistently urged that the location was not sufficiently definite. It is not to be presumed that the district would contemplate locating the schoolhouse outside of its boundaries, and, as there was but one location in the district that would correspond with that designated in the motion, it is evident that the location intended was the southeast corner of the northeast quarter of section 22, of township 27, range 5 west. The fact that the district had not acquired a site would, under the rule laid down in *Ladd v. School District*, 70 Neb. 438, be an insuperable barrier to the right of removal, were it not for the subsequent occurrences.

This action was instituted two days after the annual meeting. Five days thereafter the officers of the defendant district received and accepted a warranty deed to one acre

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of ground in the southeast corner of the northeast quarter of said section 22 from the then owner. The consideration recited in the deed was \$1, but, in fact, no consideration was paid therefor, the owner conveying the one acre to the district as a gift. This action of the district in so acquiring title to the one acre in question was set up by the defendants in their answer. In May of 1906, and while the action was pending in the district court, a special meeting of the electors of said district was called, at which the following motion was carried: "Moved and seconded that the school board of this district, School District No. 66, be authorized and directed to purchase or procure by gift or otherwise title to one acre at the S. E. corner of the N. E. quarter of section 22, Tp. 22, R. 5, in Antelope county, and if the same cannot be obtained by consent of the owner, to proceed to condemn the same for school purposes, and that when the title shall be so obtained, to proceed and move the schoolhouse to said place and properly place and locate the same thereon." Within a few days after this meeting a new deed was procured from the owner to an acre of land in the southeast corner of the northeast quarter of section 22, township 27, range 5, and the consideration of \$5 paid therefor. These facts were set up in a supplemental answer filed by leave of court.

The plaintiff contends that the district did not acquire any title by the first deed, because the voters of the district had not previously directed the purchase of the site, and that, under the holding in *Ladd v. School District*, *supra*, the action of the officers in accepting said deed did not operate to vest any title in the district. That case was decided upon section 11038, Ann. St. It is in the following language: "The said qualified voters shall also have power at any annual or special meeting, to direct the purchasing or leasing of any appropriate site, and the building, hiring, or purchasing of a schoolhouse, and the amount necessary to be expended the succeeding year, and to vote a tax on the property of the district for the payment of

the same." We are of the opinion that one of the objects of this section was to require the officers of a school district to first procure the assent of the voters before using the money of the district with which to purchase a schoolhouse site. It is doubtless true that, technically speaking, a conveyance by deed as a gift comes within the term purchase. We think the intention of the statute was to prevent the expenditure of the school district's funds, except upon the authority of the voters. But we do not think it was the intention of the legislature to prevent the acquisition of title to a schoolhouse site, to which two-thirds and more of the voters of the district had properly directed the change at their annual meeting, when the same could be acquired without the expenditure of any of the school district's funds. The voters had already directed the removal of the schoolhouse to the particular site, and had properly and lawfully indicated their wish to have the schoolhouse located at that particular place. We think it would be idle and foolish to hold that the officers of the district had not power to accept a donation that was for the benefit of the district, and to accept the site and title thereto, when the same was tendered free of cost to the district. Still, if it should be held that the officers of the district were without authority to accept the deed and title when they were tendered as a donation, the subsequent action taken in May, 1906, was sufficient to vest the title in the district.

It will be observed by reading the motion passed at the special meeting held in May, 1906, that the description locates the section in township 22, instead of in township 27. That would be 30 miles south of the point where it was desired to locate the schoolhouse, and not only outside of the district, but outside of Antelope county. In other words, it would be an impossible description. As was observed above, there was only one section 22 within the district, and it cannot be presumed that the voters had in mind a location outside of their district, or outside of their county. Nor can it be seriously urged that any

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one would be misled as to the location intended. We think all of the description coming after the words "section 22" in the motion might be wholly disregarded as surplusage. It cannot be doubted that the giving of township 22, instead of township 27, was a clerical error, and should be disregarded. The action at the special meeting held in May, 1906, was sufficient to authorize the purchase of the site in question.

Appellant contends, however, that the action in May, 1906, was insufficient to authorize the removal of the schoolhouse to a new site, because such authority could only be given at the annual meeting and must be by a two-thirds vote, while the record shows that the motion only prevailed by a majority vote. We agree with the appellant upon both of these propositions.

Appellant further contends, as above stated, that the action of the school board at its annual meeting in 1905 to change the site of the schoolhouse was void, because a site had not been previously obtained. In this contention we cannot agree. The statute does not require that the site should be first procured before a change of the site is authorized. The holdings of this court do require the acquisition of a site prior to the actual removal. We think it would be illogical to hold that the district should first procure the site before authorizing the removal of the schoolhouse to it. The purchase of a site may be authorized upon a majority vote. Suppose that a majority vote authorized the purchase of a site, then it would require a two-thirds vote to authorize the change. We think it more logical to authorize the change by a two-thirds vote and thereafter to acquire the title to the proposed site by a majority vote.

In our view of the case, the action of the school district at the annual meeting in 1905 was sufficient to authorize the change in site, and that, as soon as the title was acquired to the proposed site, the removal of the schoolhouse thereto was authorized.

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It follows that the judgment of the district court is right and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOHN WEINANDT V. STATE OF NEBRASKA.

FILED NOVEMBER 21, 1907. No. 15,260.

1. **Intoxicating Liquors: TRIAL: EVIDENCE.** In a prosecution under section 20, ch. 50, Comp. St. 1905, for unlawfully keeping intoxicating liquors with the intent to sell the same without a license, it is prejudicial error to permit the introduction in evidence, over objection, of the search warrant under which the premises of the defendant were searched and the liquors seized. *Nelson v. State*, 53 Neb. 790, followed and approved.
2. ———: ———: ———. In a prosecution under said section, it is not error to admit evidence showing the keeping of other liquors in addition to those charged; nor is it error for the jury to taste of the liquors taken from the defendant's premises under the search warrant.
3. **Instructions** numbered 6, 7 and 8, examined, and disapproved.

ERROR to the district court for Cedar county: ANSON A. WELCH, JUDGE. *Reversed.*

C. B. Willey and Millard & Sidner, for plaintiff in error.

W. T. Thompson, Attorney General, and Grant G. Martin, *contra.*

GOOD, C.

Plaintiff in error was prosecuted and convicted for the unlawful keeping of intoxicating liquors with intent to sell the same without license, in violation of section 20,

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ch. 50, Comp. St. 1905, and brings the case to this court on error.

Plaintiff in error had formerly been a licensed saloon-keeper in the village of Randolph, in Cedar county, Nebraska. After the expiration of his license he continued in his place of business, selling certain liquors under the names of "Cream of Malt" and "Malt Extract." The information charged that "certain intoxicating liquors, to wit, Malt Extract, Cream of Malt, and Hop Soda, were unlawfully owned and kept * * * with the intention of selling and disposing of the same without license or permit, that said intoxicating liquors above described were intended to be and were then and there being by and under the direction of the said John Weinandt unlawfully kept and sold without any license or permit so to do." The evidence disclosed that the plaintiff in error was in the possession of a considerable quantity of bottled liquors that were labeled "Cream of Malt," "Extract of Malt," and "Western Brew Beer." The uncontradicted testimony discloses that the plaintiff in error was keeping for sale and was selling the liquors known as "Cream of Malt" and "Malt Extract." There was no evidence that he had sold any of the liquor denominated "Western Brew Beer." Plaintiff in error sought to justify his possession of this liquor by showing that he had not ordered it, but had ordered Cream of Malt, and by mistake two barrels of Western Brew Beer had been sent to him in place of Cream of Malt, and that, when he opened the barrels and ascertained that they did not contain Cream of Malt, he did not sell any, and closed up the barrels with the intention of returning the same, and that the barrels had been in his possession only a few days when his premises were searched by the officers and the liquors seized. Upon the trial, the evidence as to the intoxicating character of the Cream of Malt and Malt Extract was conflicting. The evidence of the state tended to show that all of the liquors were, in fact, beers of the lighter sort, and that they contained between 2 and 3 per cent. of alcohol. The evidence

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on the part of the defendant tended to show that they were nonintoxicating malt liquors. The trial court received in evidence, over the objections of the defendant, the search warrant under which the liquors were seized, and the officer's return thereon. The following is a copy of the warrant and the return:

"State of Nebraska, Cedar County; To the Sheriff or any Constable of said County, Greeting: Whereas, before me, C. H. Whitney, county judge within and for said county of Cedar, complaint has been made in writing, signed and sworn to by Benjamin F. Smith, Jr., and filed according to law, that John Weinandt of said county within thirty days last past on lot twelve in block ten in the city of Randolph, in the county of Cedar, in said state of Nebraska, then and there unlawfully sold intoxicating liquors without license or druggists' permit, and that the said John Weinandt is keeping intoxicating liquors in said premises with intent to unlawfully sell the same, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the people of the state of Nebraska; these are therefore to command you to seize the intoxicating liquors found upon the premises above described and bring the same into court, and forthwith to take the said John Weinandt, if he be found in your county; or, if he shall have fled, that you pursue after the said John Weinandt into any other county within the state, and take and safely keep the said John Weinandt so that you bring his body forthwith before me, or some other magistrate having cognizance of the case of said offense so committed, to answer said complaint and be further dealt with according to law. Given under my hand and official seal, this 10th day of November, A. D. 1906. (Seal.) C. H. Whitney, County Judge."

"State of Nebraska, County of Cedar; ss. November 12, 1906, I made diligent search for the goods and chattels described in the within warrant, at the place mentioned therein, and have found the following: Four barrels of Cream of Malt, Malt Extract, and a few bottles labeled

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'Beer.' At the same time I arrested the said John Weinandt, and now have said goods and chattels and also the body of the said John Weinandt before the court within named. J. F. Rosenberger, Sheriff."

The admission of this evidence is assigned as error. The state contends that the admission of this evidence was not prejudicially erroneous, and that a jury of intelligent men would not be misled by the reading to them of the charge set forth in the warrant, and would distinguish between the charge and the proof of the commission of the acts charged. Ordinarily this might be the case, but here we have the trial court admitting in evidence the warrant over the objections of the defendant, and thereby saying to the jury that it is entitled to the probative force of evidence, and that they are entitled to consider it as evidence upon the questions in issue. No reason is given, nor is any apparent, for offering the warrant in evidence. By this warrant the jury were informed that one Benjamin F. Smith, Jr., had made oath that the defendant had, within the last 30 days, unlawfully sold intoxicating liquors without a license, and was then keeping intoxicating liquors in his place of business with the intention to unlawfully sell them. The jury were permitted to consider that evidence, and there is no way of ascertaining the weight that was given it, nor to what extent it influenced the jury in determining that the liquors, which the defendant had sold and was keeping for sale, were intoxicating. This was a material, controverted question in the case, and, as we view it, this evidence was admitted without any justification or excuse. It was calculated to prejudice the rights of the defendant, and we cannot presume that it did not.

The same question was before this court in the case of *Nelson v. State*, 53 Neb. 790. The court there held that the admission of the warrant in evidence was prejudicially erroneous. The state seeks to distinguish that case from this, because it was stated in the opinion in that case that the warrant was issued in an independent proceeding.

But an examination of the case leads us to the belief that it was the warrant under which the liquors were seized, and in all respects similar to the case at bar. The state seeks to avoid the effect of this case on the ground that the sheriff, who made the return, was a witness and fully testified to the facts, and that they did not differ from the facts set forth in the return; while in the case of *Nelson v. State, supra*, it was stated that the officer, by whom the return was made, was examined and cross-examined as a witness in that case, and that his testimony had much less of positiveness than did his return. We do not think this is sufficient to distinguish the cases, nor to change the rule laid down. The principal vice was in the fact that it informed the jury that the complainant had sworn positively to the facts that were set forth in the complaint and copied into the warrant, and that this was competent evidence for them to consider upon the issues involved. This error alone is sufficient to justify a reversal of the judgment, but there are other errors assigned that are likely to occur on a retrial, which we will consider.

The defendant complains because evidence of the keeping of Western Brew Beer was admitted in evidence, and because samples of this liquor, together with samples of other liquors than those alleged in the information, were offered in evidence, and the jury were permitted to taste samples thereof. Where the evidence shows the liquors were all substantially the same kind, although being sold under different names, and that, as in this case, all the liquors which were being sold belonged to the class of beer, it was not error to admit evidence of the keeping of other liquors of the same kind, although they bore different names. We think it would have been the same if the information had charged the defendant with the keeping of beer. Notwithstanding the liquors bore other names, yet, if they were in fact beer, the evidence concerning them was rightly received. When the evidence discloses that the defendant was in possession of the identical liquors charged, with intent to sell them, the admission of evi-

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dence showing that he kept other liquors than those charged is permissible. *Fedders v. State*, 79 Neb. 651. It has been frequently held not improper for the jury to examine the liquors and to taste thereof. *Schulenberg v. State*, 79 Neb. 65. While the court would have no authority to direct or compel the jury to taste or sample the liquors, it was not error to permit them to taste thereof if they so chose.

Complaint is made of the giving of instructions numbered 6, 7 and 8. We think each of these instructions was erroneously given. It is not necessary to set out the instructions in full. It is sufficient to say that the vice contained in each is that it did not limit the right to a conviction to the keeping of the liquors charged in the information, but informed the jury that the keeping of intoxicating liquors with the intention of disposing of the same without a license, without limiting the same to the liquors described in the information, was sufficient. The court by its instructions should have limited the jury to a determination of the questions as to whether or not the liquors described in the information were intoxicating, and as to whether or not the defendant had kept the same with the intent to sell them without a license. It is a well-recognized principle that proof of unlawful sales of whiskey will not sustain a charge of unlawful sale of beer, or the reverse. The section of the statute under which this action was prosecuted seems to require that the liquors be described as nearly as may be, and if the defendant is charged with the keeping of beer, or the keeping of other intoxicating liquor under other names, such as Cream of Malt or Malt Extract, which are in fact beer, the charge is not sustained by the proof of keeping other and different kinds of intoxicating liquors. The instructions complained of are all subject to this vice, and should not be given upon a retrial. The jury should be informed that their verdict must be based upon the keeping by the defendant with intent to sell the liquors described in the information.

For the reasons given, we recommend that the judgment

of the district court be reversed and the cause remanded for a new trial.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

IDA E. MILLER, APPELLANT, V. JOHN M. BRADFORD,
APPELLEE.

FILED NOVEMBER 21, 1907. No. 14,978.

Findings: EVIDENCE. Evidence examined, and held sufficient to sustain the findings and judgment of the trial court.

APPEAL from the district court for Red Willow county:
ROBERT C. ORR, JUDGE. *Affirmed.*

Starr & Reeder, for appellant.

W. S. Morlan, contra.

FAWCETT, C.

This is an appeal from a decree of the district court for Red Willow county, denying appellant's prayer for a reconveyance of certain lots in West McCook, and granting appellee's prayer for a decree quieting his title thereto. The only errors assigned by appellant are: "The judgment of the lower court is not sustained by the evidence. The deed from plaintiff to defendant was procured by fraud and was without any consideration whatever." The last two clauses being covered by the first, the only question for consideration is: Does the evidence sustain the findings and judgment of the court? The substance of plaintiff's contention is that she was the owner of a home con-

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sisting of some deeded lots in West McCook; that defendant came to her and represented that he owned a section of land in Dundy county for which he could give a clear deed, and proposed to trade it to her for her McCook property; that she sent her husband with defendant to examine the Dundy county land; that defendant showed her husband a lot of good valley land which did not belong to him, and by such fraudulent conduct induced him to give his approval to the trade; that plaintiff and her husband did not know until after they had delivered their deed to defendant that defendant could not give them a deed to the Dundy county land, but could only give a relinquishment of the same; that immediately after receiving the relinquishment and discovering the true character of the paper, the husband demanded a return of the deed, which was refused; that, without plaintiff's knowledge, her husband filed defendant's relinquishment of the Dundy county land and entered the same in his own name; that plaintiff never received any consideration whatever for her McCook property; that her husband was illiterate and could not even read his own name; that they relied implicitly upon the representations made by defendant, and executed and delivered to him a deed to their McCook property; that the said representations of defendant were false and fraudulent, as defendant well knew, and were made for the purpose of cheating and defrauding plaintiff out of her home in McCook, of the value of about \$1,000.

Defendant denies all allegations of fraud, and says that plaintiff and her husband knew all about the fact that he simply held the Dundy county land as a homestead entry under the Kinkaid act; that his Dundy county relinquishment was worth from \$1,200 to \$1,500; that the improvements on the land alone were worth from \$300 to \$350; that plaintiff's husband, prior to the execution of plaintiff's deed, was advised as to just what he would have to do with defendant's relinquishment in order to secure the land as a homestead; that the trade was made in good faith; that he had relinquished his homestead entry; that

plaintiff's husband had entered the lands, and that plaintiff and her husband took and still hold possession of the same.

After carefully reading every word of the evidence, we are unable to concur in appellant's view of it. To our minds it not only sustains the findings and judgment of the trial court, but so strongly negatives every contention of plaintiff, and sustains those of defendant, that a decree for plaintiff based thereon could not have been sustained.

Plaintiff contends that her husband was an illiterate man, who could not read or write. An examination of his signature to exhibit 9—the deed to the McCook property—which the witness Berry testifies he signed himself, shows that he not only can write, but that he writes an unusually good hand for a laboring man. In addition to this, his examination on both direct and cross-examination shows him to be a man of at least ordinary intelligence. Plaintiff and her husband were both upon the witness stand on the trial of the case, and the estimate placed upon their intelligence by the district court would be much better and more reliable than any opinion we might form from the reading of the record. Plaintiff's contention that neither she nor her husband knew that defendant did not own the Dundy county land, and could not make a deed thereto, is completely negatived by her own testimony and that of her husband. On page 2, while testifying as to her first interview with the defendant, she says: "I met him on the street, the first time I ever met him, he came up to me and said: 'I see you want to sell your house. Don't you want to trade it for a homestead?' " On page 22 plaintiff's husband in testifying says: "They was talking together. I didn't pay much attention to it, only the woman told me a man was up here and looked at the place, and he wants to give her a homestead for her place, and she wanted me to go up and look at it. I say: 'All right, I can go up and look at it.'" From this testimony of plaintiff and her husband, it will be seen that at the very beginning of negotiations defendant advised them that all he had to

trade was a homestead. On page 54, defendant testifies: "I told her I had a homestead filing in Dundy county, and that I would trade them my right for their house, and make a relinquishment, if they thought that would suit them. I asked if Mr. Miller had a homestead right, and she said he had. She said: 'A homestead is what Paul has been wanting for quite a while.' She said: 'He tried to get one when the new law came in, but could not get one.'" On page 55 he says: "She thought it would be just what he would want, and to go down and talk it over with him, and whatever he did would be all right with her." Then, in testifying as to the conversation with the husband, defendant says: "I told him I had a homestead I would like to trade for his house. I asked him if he had his homestead right yet, and he said he had, and I asked him if he wanted to file on a piece of land, and he said he would. That that is what he had been wanting to do for a year." Again, in testifying, on page 55, as to the conversation which he had with plaintiff and her husband together, defendant says: "I said: 'Do you understand the law? You have to live on it five years under this Kinkaid law before you can prove up and get a deed. It is not like the old law.' They said: 'Yes.' They understood that you had to live on it—that you couldn't commute under this law." The witness Green, apparently a perfectly disinterested witness, owned land adjoining the Dundy county land. When defendant and plaintiff's husband went to examine the land, they drove by Green's place, and invited Green to get in the buggy and ride over with them. Green corroborates defendant's testimony that defendant showed plaintiff's husband the right land. Green was an old acquaintance of plaintiff and her husband. After they had ridden over the land, Green and plaintiff's husband had a conversation, and, on page 45, Green says: "I said: 'Paul, you know that Bradford can't sell you this land. All he can sell you is the improvements.' And I said: 'He will relinquish.' And I said: 'You want to be there as soon as he relinquishes, because

anybody else has a right, and whoever comes along can file.' And he said: 'How much does it cost?' And I said: '\$14.' We drove a short ways farther, and I asked him: 'Have you got your naturalization papers?' And he said: 'No, I left them at McCook.' I said: 'You will have to have them.' Then I repeated what I said before in regard to Bradford not being able to sell the land." The witness Hines, who examined the abstract for defendant when plaintiff's husband returned to Benkelman with the deed, testifies, on page 70: "I took the abstract and examined it, and I thought the title was straight except \$53 taxes that were unsatisfied—unpaid—and Mr. Miller spoke up at that time and said: 'I have decided to trade our property for the relinquishment of your homestead, provided you pay the taxes.'" Mr. Hines prepared the relinquishment and took defendant's acknowledgment of it. Then defendant and Miller went to the office of Mr. Rickard, the county clerk, and requested him to fill out the necessary blanks for Miller to file upon the lands, so that they could send the filing to the government land office, with defendant's relinquishment, and thus prevent any other man from getting in ahead of him. The county clerk prepared the papers, and, on page 68, says: "I asked him if he was a native born citizen, and he said he was not. Then I asked him for his naturalization papers, or a copy of them. He said he didn't have them with him; that he would have to wait until he got back to McCook." On page 69 this question was asked Mr. Rickard, and this answer given: "Q. When in your presence at that time was there any talk had in regard to the homestead and how long he would have to live on it, or anything of that kind? A. He said that all he regretted about it was that he would have to live on it five years before he could get a deed to it." On page 81 Mr. Green, on being recalled, testifies to a conversation with plaintiff one evening in the latter part of July, which would be a month after the transaction complained of had taken place. He says: "She asked me how my wife liked it out there, and I told her it was pretty

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lonesome for her, and she said: 'When I go up there I can visit her.' " Defendant also testifies, on page 61, that about a week after the making of the deal for the land plaintiff's husband came to him to buy a horse, and that at that interview nothing was said by Mr. Miller in regard to being dissatisfied with the trade. On page 42, plaintiff was recalled by the court, by whom she was interrogated, and testifies that after the trade the defendant lived in McCook; that the first time she ever spoke to defendant about the trade and made any complaint was, as near as she could remember, some time in August, when defendant brought a man up there to sell the place, when she offered to make a settlement with him, "and he wouldn't take it"; and that she never spoke to him about it after that. Defendant Bradford fixed the time of that interview as late as the month of October. But, even if plaintiff is right about the time, it shows that she lived in the same town with the defendant for almost two months after the making of the trade without ever making any complaint to him. She waited until defendant came to show the place to a prospective purchaser, and even then she does not say that she claimed that he had defrauded her, but simply says that she "offered to make a settlement with him, and he wouldn't take it," and that she never spoke to him about it after that. It is incredible that she would so tamely submit to such a fraud as she says was perpetrated upon her. She says she never has gone upon the land, but the evidence shows that her husband took possession of the land, cut the hay upon it, and has had possession of it, together with all of the improvements made by defendant, ever since the time of the trade. All of the testimony by defendant and his witnesses stands in the record without any attempt at contradiction. In the face of such a record, it is idle to claim that plaintiff executed her deed to defendant on the strength of representations by defendant that he could and would give her a deed to his lands. All of the parties fully understood just what they were doing, and the fact that plaintiff may have subsequently con-

cluded that she had made a bad bargain is not sufficient to entitle her to relief by a court of equity. While a court of equity will at all times lend its aid to the prevention of fraud, it will not permit parties to use it as the means of getting behind transactions entered into with their eyes open, simply because they would like to undo what they have done.

Aside from all this, the record does not disclose that plaintiff was overreached in her trade with defendant. She does not claim that her McCook property was worth more than \$1,000, while the uncontradicted testimony of the defendant and the witnesses Green and Hines establishes the fact that the improvements upon the Dundy county land were worth in the neighborhood of \$300, and that a relinquishment of the lands, including the improvements, was worth, at a fair estimate, at least \$1,200. In addition to this, the testimony of Bradford and Hines shows that defendant was compelled to pay \$53 back taxes upon the McCook property.

There is no merit in the contention that, because her husband entered the lands in his name, therefore she received no consideration for the McCook property. The property in McCook was the homestead of herself and husband, the title being in her. If she saw fit to exchange that for another homestead, the title to which must, under the homestead laws, be taken in the name of her husband, and her husband obtained that homestead, and the party with whom they were dealing parted with his right thereto, she cannot now be heard to say that she has received no consideration for the homestead with which she parted.

We deem further comment unnecessary. The findings and judgment of the trial court are clearly right, and we recommend that the judgment be affirmed.

AMES and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FRANK BENDEKOVICH, APPELLANT, v. OMAHA & COUNCIL
BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED NOVEMBER 21, 1907. No. 14,916.

Carriers: NEGLIGENCE: QUESTION FOR JURY. In the circumstances of this case, the question of whether a passenger was guilty of negligence in going from the platform to the step of a moving street car with the intention of alighting therefrom is a question of fact for the jury, and not one of law for the court.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Reversed.*

T. J. Mahoney and T. J. Nolan, for appellant.

John L. Webster and W. J. Connell, contra.

AMES, C.

This is an appeal from a judgment for the defendant in an action to recover damages for a personal injury. There is no conflict of evidence, and for the sake of convenience the following statement of facts is copied from the brief of the appellee: "The plaintiff at the time of the accident in question was 18 years of age. He is a native of Austria, and had been in this country for only two months. About 10 o'clock on the evening of December 7, 1903, he boarded one of the defendant's south bound trains at the corner of Sixteenth and Williams streets in the city of Omaha. The train consisted of two cars, a motor and a trailer. Plaintiff boarded the first or motor car, and stood on the east or left-hand side of the rear platform thereof until he reached J street in South Omaha. At that point the street car tracks run north and south on Twenty-Fourth street, and J street intersects Twenty-Fourth street. Plaintiff testified that shortly after he had boarded the train he paid his fare to the conductor, and told him that he wanted to get off at J street, and that the conductor nodded his head; that about four blocks north from J street he again

told the conductor, and received the same sign from him; and that the same thing occurred again about half a block before reaching J street; that there is a church on the northeast corner of Twenty-Fourth and J streets, and, when the car was right across from the church, he walked toward the west and stepped down upon the step of the car, taking hold with both hands of the handhold in front of him, the one attached to the rear of the body of the car. Plaintiff further testified that the car did not stop at J street, but went by fast; that he wanted to move back onto the platform of the car, but could not, but the reason why he could not is not given; that the car went fast all the time; that he got scared so badly he fell down—fell down on the street. The only other witness who testified in regard to the happening of the accident was Henry Kochelek. Mr. Kochelek testified that he was a passenger on the same train, and that he sat in the trailer car, on the west or right-hand side thereof, and within about two feet of the front end; that the conductor stood on the front platform of the trailer with his hand upon the brake; that he (witness) saw plaintiff standing on the rear platform of the first car; that as the car was pretty near hitting J street he saw plaintiff motion to the conductor and start to walk off, and he noticed 'the jar, or something.' This 'jar or something' occurred while the plaintiff was still upon the platform of the car. Kochelek stated that he didn't know what followed after plaintiff struck the step; that he couldn't say how plaintiff got down the step, because he paid no attention; that as plaintiff moved west on the platform the car was going a pretty good gait, kind of jarring. Mr. Kochelek did not see the plaintiff fall, his attention being first attracted to the accident by the conductor ringing the bell and looking out on the side. The car stopped on the north side of K street, but Kochelek got off before it stopped 'to see who was hurt—to see if he really was getting off while it was going that gait. I wanted to see who he was.' This witness further testified that, after the car crossed J street, it was running about

25 or 30 miles an hour. After plaintiff had rested his case, and after the arguments on defendant's motion for a peremptory instruction had been partly made, the plaintiff was given leave to withdraw his rest and to introduce further testimony. Witness Kochelek was recalled, and testified that the car started to go faster when it was pretty close to J street—the north side of it; but this witness was unable to further describe this change in speed. He could not tell how much of a change was made, nor how much faster the car was going. John Bendekovitch testified that the distance from the south side of J street to the point where the plaintiff was picked up after the accident was 250 feet. There was no evidence of any imperfection in the car or track, either as to construction or operation, nor that there was any unusual or extraordinary jarring or jerking of the car; neither that the plaintiff's fall to the street was caused by any jerking or jarring of the car or on account of any imperfection in either the car or the track. At the close of plaintiff's case, on motion of the defendant, the trial court instructed the jury to return a verdict for defendant."

Considerable discussion has been devoted by counsel to the inquiry: What was the proximate cause of the accident? but that question seems to us to conceal no mystery. Evidently the proximate cause was the concurrence of two circumstances, in the absence of either of which the accident would not have happened. If the car had stopped at J street, the plaintiff would have alighted without injury. If he had remained within the car or on the platform, he would have been carried onward in safety. There is no other circumstance to which the mishap can be attributed. The car does not appear to have been moving at an unaccustomed rate of speed, although the rate was high and was accelerated after crossing J street. That the speed was high, some 25 miles an hour, and that it would be so accelerated, the conductor, it will be assumed, must have known, and the latter fact it is not shown that the passenger did know, but, as already said, the rapidity of the mo-

tion would have caused no harm, if the passenger had not attempted to alight. That he desired to alight at the point designated and would probably put himself in readiness so to do, the conductor had been informed, and had, besides, opportunity to observe. That the latter was negligent of his duty toward the former seems to us to be free from doubt.

But was the negligence of such a character that a reasonably capable and careful man in the position of the conductor would have anticipated the accident as a probable consequence thereof? This raises the question whether the conduct of the passenger was such as no ordinarily intelligent and careful man would have shown under the same or similar circumstances, for it was upon such conduct that the conductor, although himself negligent, had a right to rely. It is not a case of intentionally and voluntarily standing upon a car step or running-board for the purpose of continuous riding, which several courts have held to be negligence *per se*, but it is an instance of going down upon the step or board in anticipation of almost immediately leaving the same by alighting upon the ground when the car shall have stopped, or nearly so. Now, this is an act that men of all grades of intelligence, experience and prudence are frequently and constantly committing. We suppose it is done thousands of times every day in all the considerable cities of the United States, so that its frequency must be regarded as a matter of common knowledge of which the courts take judicial notice, and to hold that such an act is at all times and in all circumstances negligence *per se*, or in law, would be to say that the universal custom of intelligent and prudent men is such, which, as it seems to us, would be to utter an absurdity. But an act which is prudent in some or in most circumstances may be negligent or criminal in others; and the question now calling for decision is: Who shall discriminate the circumstances, the court or the jury? Applying the inquiry concretely to the facts of this

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case, considering the speed of the car and the character of the locality, and the fact that the passenger had repeatedly notified the conductor of the place at which he desired to get off, and the known duty of the latter to give a signal to stop, and the knowledge of the passenger, if he had knowledge of the subject, whether the signal had been given, is not the question of negligence one of fact for the jury, rather than one of law for the court? In our opinion, the answer should be in the affirmative. It does not appear to us that the case is different in principle from that of a multitude of others in which the jury is required to say whether, under all the circumstances of the case, the conduct of a party was that of a reasonably or ordinarily intelligent and prudent man. And, the negligence of the defendant having been established, the burden of proving contributory negligence is upon it, and the question is one of fact for the jury.

We are therefore of opinion that the judgment of the district court should be reversed and a new trial granted.

CALKINS, C., concurs.

FAWCETT, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and a new trial granted.

REVERSED.

JOHN REDELL, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED NOVEMBER 21, 1907. No. 14,966.

1. **Cities: CHIEF OF FIRE DEPARTMENT.** Whether the chief of a municipal fire department is an officer within the meaning of the rule that an officer *de jure* is entitled to the emoluments of the office without reference to actual incumbency or services, or whether he is merely an employee to whom other principles are applicable, *quære*.

2. **Appellate Court: JURISDICTION.** The jurisdiction of an appellate court is dependent upon that of the tribunal from which the appeal is taken.
3. **Cities: CLAIMS: ALLOWANCE.** The charter of the city of Omaha (Comp. St. 1903, ch. 12a, sec. 901), which enacts that the mayor and council shall not allow or authorize to be paid a claim presented under certain circumstances or after the lapse of a certain time, is a limitation upon the power and jurisdiction of the body itself, and a claim so situated, and not falling within an exception of the statute, is extinguished, so far as the judicial powers of the mayor and council are concerned.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

Weaver & Giller, for appellant.

H. E. Burnam and I. J. Dunn, contra.

AMES, C.

The plaintiff filed with the mayor and council of the city of Omaha a demand for compensation as chief of the fire department of that city during a time in which he claims to have been a *de jure* incumbent of that position, although it was in fact held by another who performed the service and received the salary pertinent thereto. The mayor and council rejected the claim, and an appeal to the district court resulted in a judgment of dismissal, from which an appeal is prosecuted in this court.

The plaintiff asserts his right to the salary as an incident to the *de jure* title, and the argument "upon the merits" in this court has been confined principally to a discussion of that proposition. But we doubt whether a chief of a fire department is an officer within the meaning of the rule invoked, or whether he is not more properly regarded as a municipal employee, to whom other principles are more applicable. This question has not, however, been discussed by counsel, and, in our view of the case, does not require present decision.

The city charter contains the following enactment: "No

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bill for labor or material or account of whatsoever kind against the city, after it has been adversely reported on and rejected by the administration under which it has been incurred, and no bill not presented or claimed within eighteen (18) months after it was incurred and payable, shall be allowed or authorized to be paid by any mayor and council of a subsequent administration, except through the order of a court of competent jurisdiction. These provisions shall apply equally to any modification of the same account, in whatever form it may be presented." Comp. St. 1903, ch. 12a, sec. 901. It is not disputed that the plaintiff's claim is embraced by the prohibition and does not fall within the exception of the foregoing statute. It does not seem to us that there is room for argument. The legislature could not have chosen language more apt for the expression of an intent that a demand so situated shall be extinguished, so far as the judicial powers of the mayor and council are concerned. The enactment is not analogous to an ordinary statute of limitations, which the defendant may waive at his discretion. To hold that the city authorities, or their representatives, may do so would be, in practical effect, to repeal the statute. The limitation is of the power and jurisdiction of the auditing body itself, whose disobedience thereto would be a void act. It is axiomatic that a court in which an appeal may be prosecuted must derive its jurisdiction from the tribunal from which the appeal is taken. It would be absurd to say that the court may treat as erroneous and reverse an order made by the mayor and council in obedience to a peremptory statute. Precisely the same situation would have arisen if the mayor and council had simply ignored the claim, and a mandamus had been applied for to compel them to take action upon it. No action was required of them. They were as powerless to reject the claim as they were to allow it. The one order is equally as void or futile as the other would have been, and there is nothing from which an appeal can be taken. Their order of disallowance, for the reason given, was

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purely ministerial and formal, and in no sense judicial. It will be soon enough to ascertain what is meant by the saving clause or exception when the question is presented in some court having jurisdiction and in a manner calling for its decision.

We are satisfied that the judgment of the district court is right, and recommend that it be affirmed.

CALKINS, C., concurs.

FAWCETT, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JEREMIAH H. COOLEY, APPELLANT, v. THOMAS D. RAFTER
ET AL., APPELLEES.

FILED NOVEMBER 21, 1907. No. 14,991.

Appeal: CONFLICTING EVIDENCE: FINDINGS. When the evidence in the district court consists of oral testimony which is in sharp and irreconcilable conflict, and the conclusion derivable therefrom is dependent in part upon inferences from circumstances, some of which are in dispute, and in part upon the weight and credibility of testimony to be determined from the degree of competency of the witnesses, their opportunity for knowledge and the apparent clearness of their recollection, and the reasons therefor, the findings of the trial judge will be considered in determining the issues in this court.

APPEAL from the district court for Thayer county:
LESLIE G. HURD, JUDGE. *Affirmed.*

M. H. Weiss, J. T. McCuiston and Berge, Morning & Ledwith, for appellant.

C. L. Richards and T. C. Marshall, contra.

AMES, C.

This is an action to foreclose a mechanic's lien for lumber and materials alleged to have been furnished by the

plaintiff, a retail dealer in such articles, to the defendant for the building of a house upon grounds of the latter. The amount claimed in the petition is \$844.62, which is not disputed, but the answer alleges, in substance, that the lumber and materials were furnished pursuant to an oral contract by which the plaintiff undertook to provide the same and construct the defendant's house for a total cost or price of \$850, upon which defendant had paid the sum of \$354.24, leaving a remainder due plaintiff of \$555.76, and no more, for which latter sum and costs of suit defendant offered to confess judgment. The reply is a general denial. There was a trial to a jury, resulting in a disagreement, and a second trial to the court without a jury, followed by a finding of the issues of fact in favor of the defendant and a judgment for the plaintiff for \$495.76. The plaintiff appealed.

Counsel agree that the trial court committed no reversible error of law, and that the only subject of controversy is the correctness of the finding of the issue of fact whether the plaintiff agreed simply to furnish lumber and material for the building of the defendant's house, or whether he agreed to construct the house for a specified sum, furnishing the lumber and material necessary therefor. It is admitted, too, that the evidence upon this issue consists wholly of oral testimony offered before the trial judge, which is in sharp and irreconcilable conflict, and that the conclusion derivable therefrom is dependent in part upon inferences from circumstances, some of which are in dispute, and in part upon the weight and credibility of testimony to be determined from the degree of competency of the witnesses, their opportunities for knowledge, the apparent clearness of their recollection, and the reasons therefor. We think the rules laid down by this court for its guidance in such cases in *Faulkner v. Simms*, 68 Neb. 299, as well as in subsequent cases decided under the present statute, are sound and indispensable to the due administration of justice. The trial judge, who knows the parties and who personally presided over the examination

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of the witnesses and observed their demeanor, is far more competent, in most cases, to weigh their testimony and deduce correct conclusions therefrom than can this court be, having before it nothing more than an unresponsive written record. The findings of the trial court in such cases will be considered in determining the issues in this court. The whole evidence, however, will be examined, and the issues determined anew.

These findings are supported by the evidence, and we therefore recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JAMES M. HURN, APPELLANT, v. JOSEPHUS ALTER,
APPELLEE.

FILED NOVEMBER 21, 1907. No. 14,969.

Boundaries: EVIDENCE. In determining the boundaries of land, fixed monuments and known corners govern both courses and distances; and, where the existence of the original government corner is established at a certain point by sufficient evidence, its authenticity cannot be overcome by showing that the location is not at the distance from other monuments indicated by the field notes of the original survey.

APPEAL from the district court for Harlan county: ED L. ADAMS, JUDGE. *Affirmed.*

W. S. Morlan and O. M. Miller, for appellant.

R. L. Keester and Gomer Thomas, contra.

CALKINS, C.

In 1871 section 10, town 1, range 18, in Harlan county, was surveyed and subdivided by the government surveyors.

In 1875 W. P. Carr, who had entered the southeast quarter, and Louis Moore, who had entered the northeast quarter, under the homestead laws, employed George C. Reed, then county surveyor, to ascertain and mark the boundaries of their respective tracts. At that time the original monuments of the government survey marking the quarter corners of the boundaries of section 10 were found. Between these quarter corners Mr. Reed established lines east and west and north and south, marking their intersection as the center of the section. Fields were cultivated, and later fences built according to the lines so established, which seem to have been recognized as the true interior boundaries of the four quarters by the proprietors thereof until 1901, when A. Hoffmayer, then county surveyor, was called to resurvey the section. He accepted monuments as marking the original government corners at the northwest, northeast and southeast corners of the section. Finding no monument at the southwest corner, he ran a line between a recognized government corner at the southwest corner of section 15 and the northwest corner of 10 as recognized by him, and, dividing the distance so found, established the southwest corner of 10. He found no quarter corners, but proceeded to establish them by measurements, dividing distances between the section corners so recognized and established by him. He established lines east and west and north and south from these quarter corners, thus marking the interior boundaries of the four quarters, and placed a monument at the intersection of the two lines, in the center, 165 links south and 62 links west of the center corner theretofore recognized and claimed to have been established by the Reed survey in 1875. The adoption of this survey as correct would result in moving the boundaries south and west from where they had been supposed to lie; and the plaintiff, owning a part of the northeast quarter, brought this action against the defendant, owning the northwest quarter, praying to quiet title in the plaintiff to the land lying between these two boundary lines. There was a trial to

the district judge, who found that the land in dispute was a part of the northwest quarter, and, from a judgment rendered upon this finding, the plaintiff appeals.

The rule that fixed monuments and known corners govern both courses and distances, is well established; and, where the existence of an original government corner is established at a certain point by sufficient evidence, its authenticity cannot be overcome by a showing that the location is not at the distance from other monuments, indicated by the field notes of the survey. The interior boundaries of the four quarters of a section are not marked upon the government survey, but they are ascertained by establishing a right line between the quarter corners on the east and west and the north and south of the section, the point of intersection of these lines marking the center of the section. The real question in determining the interior boundaries of a section is the location of the original quarter corners. If they can be established, the boundaries are to be determined from their location. If they are lost and cannot be determined, they may be ascertained by surveying from the nearest known points and dividing distances. In this case it is contended by the plaintiff that these original quarter corners are lost, and that the surveyor Hoffmayer properly established them by measuring from the nearest known corners and dividing distances. On the other hand, it is contended by the defendant that, while the government survey was comparatively new, and while each quarter corner was visible, the interior lines were surveyed by Mr. Reed in accordance with the original monuments at the quarter corners, and the center of the section established; that the then occupants of the land began the cultivation thereof according to these lines, and afterwards built fences thereon; and that in this manner the location of the original government quarter corners has been preserved and is established by the evidence. The witness Carr entered as a homestead the southeast quarter, and he, with one Moore who entered the northeast quarter, procured the Reed sur-

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vey to be made. He identifies the location of the lines and corners down to a period subsequent to the building of the fences, and from that time to the bringing of the action the identity of their location is sufficiently established. If the witnesses were to be believed, and their memories to be trusted, there was sufficient evidence from which to find that these fences marked the original boundaries of these tracts according to the original government quarter corners. This was the finding of the trial judge, which is supported, as we think, by the preponderance of the evidence and should not be disturbed.

. In view of the conclusion at which we have arrived, it is unnecessary to consider the question of adverse possession or acquiescence raised by defendant.

We therefore recommend that the judgment of the district court be affirmed.

FAWCETT and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ELMER E. SHAFFER, APPELLANT, v. HELEN W. MURRAY,
APPELLEE.

FILED NOVEMBER 21, 1907. No. 14,970.

APPEAL from the district court for Harlan county: ED
A. ADAMS, JUDGE. *Affirmed.*

W. S. Morlan and C. M. Miller, for appellant.

R. L. Keester and Gomer Thomas, contra.

CALKINS, C.

This cause was tried with, and upon the same evidence as, *Hurn v. Alter, ante*, p. 183. The statement of facts and

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opinion therein being applicable to this case, we recommend that the judgment of the district court herein be affirmed.

FAWCETT and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

LORENCE BAUER ET AL., APPELLEES, v. H. W. MITCHELL ET AL., APPELLANTS.

FILED NOVEMBER 21, 1907. No. 14,981.

Attachment: BOND: LIABILITY. Where an action is brought without the authority or sanction of the party in whose name it is prosecuted, and an attachment is procured to be issued thereon, such attachment is wrongfully obtained within the meaning of section 200 of the code.

APPEAL from the district court for Antelope county:
JOHN F. BOYD, JUDGE. *Affirmed.*

E. D. Kilbourn, for appellants.

O. A. Williams, *contra*.

CALKINS, C.

On the fifth day of October, 1903, an action was begun in the district court for Antelope county in the name of the J. I. Case Threshing Machine Company against the plaintiffs herein upon certain notes not then due. An affidavit for an attachment, alleging that these plaintiffs were about to remove and sell their property with intent to defraud their creditors, was filed, and, after the execution and approval of a bond in the usual form, signed by the defendants herein as sureties, an order of attachment was issued under section 237 of the code. This order was

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executed by a seizure of the plaintiffs' property. They afterwards moved to discharge the attachment upon the ground that the facts stated in the affidavit were insufficient and untrue, and that an excessive levy had been made. While this motion was pending, the J. I. Case Threshing Machine Company filed a motion to dismiss the action, on the ground that they never authorized the bringing of the suit. On the 15th day of January, 1904, the district court made an order that the attachment be vacated and discharged, and the property returned to the plaintiffs. On the same date the court granted the motion of the J. I. Case Threshing Machine Company to dismiss the action. Thereupon the plaintiffs brought this action upon the bond for attachment. A trial to a jury was had, resulting in a verdict for the plaintiffs, and, from a judgment rendered upon such verdict, the defendants appeal.

There was no evidence as to whether the charge in the affidavit for attachment that the plaintiffs were about to remove and sell their property with intent to defraud their creditors was true or untrue, and the defendants contend that, as under the rule adopted in *Storz v. Finklcstein*, 48 Neb. 27, 50 Neb. 177, the mere dissolution of an attachment does not establish its wrongful issue, the plaintiffs were bound to disprove the fraudulent intent charged against them in the affidavit for attachment by other evidence than the order of dissolution, and that, having failed to do so, the evidence does not sustain the verdict. The fact that an attachment was wrongfully obtained may be established in other ways than by showing that the allegations of fraudulent intent were untrue. In this case the defendants in their answer allege that the action begun in the name of the J. I. Case Threshing Machine Company was brought without the authority or sanction of said company, and set forth the proceedings in which the said company appeared in court and procured a dismissal of said action upon the ground that it was brought without their authority. Where an action is brought without the authority or sanction of the party in whose name it is

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prosecuted, and an attachment is procured to be issued therein, such attachment is wrongfully obtained. The rule in *Storz v. Finklestein, supra*, goes no further than to hold that, where an attachment is dissolved on account of defects in the form of the proceedings, or for omissions, irregularities or informalities which the officer may commit in the issuance of the process, such dissolution does not show that the same was wrongfully obtained; but the seizure of a person's property by means of an attachment issued in a suit brought without the knowledge, consent or sanction of the party in whose name it is prosecuted is not an irregularity or defect in the form of the proceeding. It is a substantive wrong of a flagrant character, and we think it within the condition of the bond. The defendants undertook to pay these plaintiffs all damages which they might sustain by reason of the attachment in question if the order was wrongfully obtained; and they themselves allege facts showing that it was wrongfully obtained.

The judgment of the district court was right, and we recommend that it be affirmed.

FAWCETT and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ANN W. BARNES ET AL., APPELLEES, V. ALONZO B. MINOR,
ET AL., APPELLANTS.

FILED DECEMBER 5, 1907. No. 14,807.

1. **Drainage Districts: ORGANIZATION: JUDICIAL INQUIRY.** The power of the legislature over the subject of procedure, within limits not impairing the inherent powers or jurisdiction of the courts, is not restricted; and it is competent to require, by statute, a preliminary judicial ascertainment of facts, the existence of which is made a condition precedent to the creation of a public corporation.

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2. ———: ———. The act of 1905 (laws 1905, ch. 161), relative to "the organization and government of drainage districts; for the reclamation and protection of swamps, overflowed or submerged lands," does not contemplate the inclusion of a railroad company's right of way, depot grounds and appurtenances as a part of the district.

APPEAL from the district court for Richardson county:
JOHN B. RAPEE, JUDGE. *Affirmed in part.*

Roscoe Pound, J. W. Deucece and Frank E. Bishop, for appellants.

A. R. Keim, A. R. Scott, E. Ferneau, H. A. Lambert, E. B. Quackenbush and Francis Martin, contra.

BARNES, J.

This is a proceeding for the creation of a drainage district in Richardson county, and is, in so far as has been brought to our knowledge, in formal compliance with the provisions of an act of the legislature of 1905, entitled, in part, "An act for the organization and government of drainage districts; for the reclamation and protection of swamps, overflowed or submerged lands," * * * and providing a procedure therefor. Laws 1905, ch. 161. Section 1 of the act provides for the organization of an association by adopting articles of incorporation by the persons owning contiguous tracts of such lands as are mentioned in the title, and embraced within an area of not less than 160 acres. The articles are required to define the limits of the proposed drainage district and describe the several tracts of land included therein and owned by the persons joining in the execution of said articles, together with such tracts of land in said proposed district as are owned by persons not joining, and the names of such persons. The articles, when executed, are required to be filed in the office of the clerk of the district court for the county, together with a prayer for process against the nonconsenting landowners.

It is further provided by the act that, upon the service of such process on the nonconsenting landowners, they may file their objections, if any, in writing, and, upon a proper hearing, the district court, by its order duly entered of record, shall declare said drainage district a public corporation of this state; and the court may exclude such lands as will not be benefited, and declare the remainder a drainage district, as prayed for. It appears that the right of way, road bed and depot grounds of the Chicago, Burlington & Quincy Railway Company traverse a part of the proposed drainage district, and said company was described in the articles as a nonconsenting landowner; that after process was served upon it the company appeared and objected to being made one of the incorporators, and to the inclusion of its said right of way and depot grounds as a part of said drainage district. Upon the hearing, the district court overruled the company's objections, and made an order including its property within and making it a part of the district. From that order the company has appealed.

Its first contention is that the act is unconstitutional and void, because it attempts to confer upon the district court duties and powers not judicial in their character. In support of this proposition counsel cite *Dodge County v. Acom*, 61 Neb. 376, and *Tyson v. Washington County*, 78 Neb. 211. It must be observed that in those cases the legislature had conferred the power upon the county board to determine the question as to whether the proposed drainage improvement would be conducive to the public health and welfare, and it was held that this was an administrative function properly conferred upon the county board, and that the district court was without jurisdiction of that matter either original or upon appeal. The case at bar, however, presents such facts and conditions relating to the sufficiency of the procedure, and the character and quantity of the lands sought to be affected thereby, as may, and is likely, to be drawn in question and give rise to a judicial inquiry as to their existence.

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So it was enacted that such inquiry shall be had as a preliminary step to the organization of the corporation and the existence of its corporate powers.

Manifestly, as it seems to us, the court in such a proceeding is called upon to exert no other than its ordinary judicial functions. The statute prescribes that, if certain steps have been taken and certain facts exist, a governmental corporation shall be deemed to have been created, not otherwise, and the court by the exercise of its usual powers and by the observance of judicial methods ascertains and determines that such steps have or have not been taken, or that such facts do or do not exist, and from these premises draws an inference or reaches a conclusion which it pronounces in a form of a judicial order or judgment in like manner and in like effect as in ordinary cases. The power of the legislature over the subject of procedure, within limits not impairing the inherent powers or jurisdiction of the courts, is not restricted, and it is competent to require, by statute, a preliminary judicial ascertainment of facts, the existence of which is made a condition precedent to the creation of a public corporation. The powers conferred upon the court by the act in question are analogous to those which have been upheld by the decisions of this court in proceedings to determine questions of fact involving the rightful inclusion or exclusion of tracts of land in or from the corporate limits of cities and villages. *City of Wahoo v. Dickinson*, 23 Neb. 426; *Young v. Salt Lake City*, 24 Utah, 321; *Forsythe v. City of Hammond*, 142 Ind. 505, 30 L. R. A. 576. So, without determining any other question which may be subsequently raised touching the validity or constitutionality of the act, we are of opinion that the appellant's criticism is not well taken, and so far as this point is concerned the act is constitutional.

Appellant's second contention is that the court erred in declaring it to be an incorporator of the drainage district, and its roadbed, right of way and depot grounds a part of said district. The act in question does not, in

express terms, provide for making a railroad company or a county a member of the drainage district; and it would hardly seem probable that it was the intention of the legislature that a public road, controlled by the county, or the right of way, railroad track or depot grounds of a railroad company, should be a part of a drainage district within the meaning of said act. From the nature of *quasi* public corporations, such as counties, and public service corporations, like railroad companies, it would seem clear that neither of them could become a member of a drainage district. From the very nature of their organization, and the powers conferred upon them by law, they would be unable to exercise the duties and claim the privileges required of and given to private owners of land situated within such district; and this thought is strengthened by the provisions of section 19 of the act, which reads, in part, as follows: "That when ditch, drain or watercourse, located and established under this act, crosses or drains, either in whole or part, any public or corporate road, or any railroad, or benefits any or either of said roads, so that the roadbed or traveled track of any such road will be made better by the opening and construction of any such ditch, drain or watercourse, or the straightening of any watercourse, the board of supervisors shall apportion and set off to the county, if a county road, or to a company, if incorporated, or a railroad, a portion of the costs and expenses, the same as to private individuals, and in proportion to the benefits conferred by said ditch, drain, or watercourse on said roads." Comp. St., ch. 89, art. IV, sec. 19. So it would seem that the law simply requires a railroad company, when its roadbed or right of way traverses the drainage district, to contribute to the cost or expense of the construction of the drainage improvement in proportion to the benefits thereby conferred upon it. Section 4 of the act provides for the filing of the articles of incorporation with the secretary of state, after the order of the district court is made declaring the dis-

trict to be a public corporation. Sections 5, 6, 7 and 8 provide for the election of a board of supervisors to govern the affairs of the corporation, and prescribe the powers and duties of such board; while section 13 provides, in substance, that after the drainage district shall have been organized, and the board of supervisors elected and qualified, they shall estimate and apportion the necessary expenses for the construction of the improvement, and to that end shall give notice of the time and place of hearing to all persons interested, or whose property will be affected thereby, who may appear before said board on the day set for hearing and file their objections to such estimate and assessment; that a hearing shall be granted, and after such hearing the board shall make a final order in the matter, fixing and declaring the several amounts which shall be paid by the said persons found by them to be benefited by the improvement. Section 17 provides for an appeal by any person aggrieved by the decision of the board to the district court. So we are of the opinion that the order of the district court, in so far as it adjudged the appellant's right of way, railroad track and depot grounds a part of said drainage district, was erroneous, and its determination on the question of benefits, if any such was had or made, was premature. It seems clear that neither a county nor a railroad company, under the circumstances shown to exist in the case at bar, is a necessary party to the proceeding in the district court to declare the drainage district a public corporation. It is also apparent that, when the supervisors come to assess the property of such a corporation for the cost of the improvement according to the benefits conferred, it is entitled to have notice of the proceeding and a hearing thereon, and it may appeal from the judgment or order of the board in making such assessment.

For the foregoing reasons, so much of the judgment of the district court as declares the appellant to be a member of the drainage district and its roadbed, right of way and depot grounds a part of said district is hereby reversed,

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and in all other things said judgment or order of the district court is affirmed.

JUDGMENT ACCORDINGLY.

CALVIN HARRIS V. STATE OF NEBRASKA.

FILED DECEMBER 5, 1907. No. 15,439.

1. **Rape: EVIDENCE: SUFFICIENCY.** Record examined, and found to contain sufficient evidence corroborating the testimony of the prosecutrix to warrant the submission of the question of the defendant's guilt to the jury.
2. **Criminal Law: INSTRUCTIONS.** In a prosecution for rape, it is not error for the court to refuse an instruction as to the necessity for corroboration, where he has properly instructed the jury on that question on his own motion.
3. **Rape: EVIDENCE: PREVIOUS CHASTITY.** In a prosecution for rape upon a female child under 15 years of age, where the only competent evidence as to her age shows that she was less than 15 years old at the time of the commission of the act, the question of her previous chastity is immaterial, and it is not reversible error to refuse to submit that question to the jury.
4. **Information: SUFFICIENCY.** It is not commendable for the prosecuting attorney to use any word, abbreviation or letter in an information, designating the race or color of the defendant; but, where it appears that such designation cannot result in any prejudice to the substantial rights of the defendant, it is not a ground for quashing the information.
5. **Criminal Law: COMPLAINT.** A wife may sign and file a complaint against a husband in prosecutions for rape.
6. — —: **MISCONDUCT OF PROSECUTING ATTORNEY.** Where the question as to the alleged misconduct of the county attorney in conducting the prosecution has been submitted to and decided by the trial court on conflicting evidence, such decision will not be disturbed unless it is unsupported by the testimony and is clearly wrong.
7. — —: **EVIDENCE: REVIEW.** General assignments of error for the admission or rejection of evidence will not be discussed unless specifically called to the attention of the court by brief or oral argument, where no manifest error appears.

ERROR to the district court for Lancaster county. LINCOLN FROST, JUDGE. *Affirmed.*

Billingsley & Greene, for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin*, *contra*.

BARNES, J.

The plaintiff in error, who was the defendant in the court below, and who will be so designated in this opinion, was convicted in the district court for Lancaster county of the crime of statutory rape, and brings the case here for review.

His first contention is that the evidence is not sufficient to sustain the verdict, because there was no testimony introduced by the state corroborating the story of the prosecutrix. We learn from the record that the prosecutrix was the stepdaughter of the defendant; that he married her mother on the third day of July, 1900, and since that time she has been a member of his family. She testified, in substance, that she was born on the 26th day of July, 1891; that in the first part of the month of May, 1906, the defendant came into her room at their home in Lancaster county, Nebraska, and insisted on having sexual intercourse with her; that she finally consented, and he thereupon accomplished his purpose; that she became pregnant therefrom, and was delivered of her child on the 20th day of February following. Without going into details, it may be said that if her evidence is to be believed it is sufficient to establish defendant's guilt beyond a reasonable doubt. It further appears that she was examined by a reputable physician about the first of January, 1907, who testified that she was then pregnant with an eight months fetus; that she was a fully developed woman, and presented the appearance of having had a great deal of sexual intercourse. The evidence also shows that before the birth of her child, and before the defendant was ar-

rested, there was a conversation between the defendant, the prosecutrix and her mother in the office of the county attorney, in the presence of that officer and of two other persons; that in that conversation the mother taxed the defendant with being the author of the condition of the prosecutrix, which he denied, and, thereupon, the prosecutrix, becoming somewhat excited, charged him with being the author of her downfall, called his attention to a number of different times and places where he had had sexual intercourse with her, and the defendant remained silent and made no denial of her statement. It also appears that the defendant procured various kinds of medicines or nostrums, commonly used to cause menstruation or produce abortion in the early stages of pregnancy, and furnished them to the prosecutrix. This he did not deny, but explained the matter by saying that he procured them at the request of his wife. The prosecutrix testified that she knew nothing about that matter, and, as the wife was not permitted to testify, his explanation was left without denial. It further appears, however, that, when the defendant was confronted with the charge, he wanted to know if there was not some way in which it could be fixed up or settled. He stated, in the presence of the prosecuting attorney and two or three other persons, that he would give his property, all he had, and more too, if he could get it settled up. Again, the fact was plainly shown that the prosecutrix had never at any time been in the company of other men or boys; that her associations with the defendant were such as to afford ample opportunity for sexual intercourse between them; and so, taking all of the evidence together, it would seem that there was sufficient corroboration of the testimony of the prosecutrix to warrant the court in submitting the question of the defendant's guilt or innocence to the jury, and their finding on that question should not be disturbed by a court of review.

It is further contended that the court erred in refusing to give the third instruction requested by the defendant. This request related to the necessity for corroboration.

While it may be said for the instruction that it was substantially correct, yet, the court having instructed upon that question on his own motion, it was not error to refuse the defendant's request. The record shows that the instruction given by the court was in form and substance like the one given and approved in *Fager v. State*, 22 Neb. 332, *Hammond v. State*, 39 Neb. 252, and *Dunn v. State*, 58 Neb. 807. So it is clear that the defendant was deprived of none of his substantial rights by the court's refusal to give the instruction requested.

It is also claimed that the court failed to submit the question of the previous chastity of the prosecutrix to the jury, and it is contended that such failure is prejudicial error. The only competent evidence of the age of the prosecutrix which we find in the record shows that she was born on the 26th day of July, 1891; that the act of sexual intercourse complained of took place between her and the defendant in the early part of May, 1906. At that time the prosecutrix lacked more than two months of being 15 years old. This being the case, the question of her previous chastity was wholly immaterial. It may be further said that there is no evidence in the record from which a single unchaste act of hers, except with the defendant, can even be inferred. So there was no evidence to sustain a finding on that subject, and the court did not err in failing to instruct upon that point.

The defendant filed a motion to quash the information, because the letters "col." were placed therein after the defendant's name, and were also indorsed on the back thereof; and it is insisted that the court erred in overruling the motion. The argument is that it was the purpose and intent of the prosecution to designate the defendant as a colored man, or one of the African race, and thus discriminate against him and deny him the equal protection of the law. We think this contention is without merit. While it is not commendable for a prosecutor to designate the color of a defendant in a charge made against him, yet we fail to see wherein it would prejudice his

rights. Under the early common law, where the party indicted was of the degree of knight or some higher dignitary, it was required to set out in the indictment the name of the dignitary, and it was common to designate the defendant, not only by his name, but by his station in life, or by his profession, in order to meet the then requirements of certainty. But this has never been required or practiced in prosecutions in this country. It may be further said that the color of the defendant's skin and his physical characteristics would reveal the race to which he belonged; that the jury and the court would necessarily be apprised of the fact that he was a colored man without the designation complained of, and therefore such designation would not result in any prejudice to his substantial rights.

The defendant also filed a plea in abatement, in which it was charged that he had never had a preliminary examination, the foundation of that charge being the fact that the complaint before the magistrate was signed by his wife. It is insisted that, as the wife was not a competent witness and could not be permitted to testify against her husband, she therefore could not be permitted to file a complaint against him. The court sustained a demurrer to the plea, and the defendant alleges error. It was held in *Latimer v. State*, 55 Neb. 609, that a preliminary examination is a personal privilege, which may be waived. The same rule was also announced in *Coffield v. State*, 44 Neb. 417. It appears that the defendant in this case made no objection to the complaint filed before the justice, but waived his preliminary examination, and, if necessary, we might hold that he thereby waived his right to object to the complaint upon the trial of the cause. But, without deciding this question, we are inclined to think that the wife of a defendant can testify against him in a case of this character. It is true that the offense charged is against the prosecutrix, but it is also an offense against defendant's wife in the nature of adultery. In *Lord v. State*, 17 Neb. 526, this court held that the wife may

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testify against the husband on a charge of adultery. It was also held in *Owens v. State*, 32 Neb. 167, that the wife is a competent witness against the husband on a charge of incest. If the wife is a competent witness in crimes of this nature, there would appear to be no reason for a contrary rule in a case of statutory rape. And so we are of opinion that the demurrer to the plea in abatement was properly sustained.

Defendant filed a motion in arrest of judgment, and now alleges error because the court overruled it. What we have said in disposing of the foregoing assignments renders it unnecessary to further discuss this question. The motion was properly overruled.

Complaint is also made of the misconduct of the prosecuting attorney. We find from an examination of the record that that matter was presented to the trial court by a motion for a new trial, and upon affidavits and other evidence was determined adversely to the defendant's contention. This being the case, the findings and judgment of the district court on that matter will not be disturbed, unless they are unsupported by the evidence and are clearly wrong. *Cunningham v. State*, 56 Neb. 691; *Clark v. State*, 79 Neb. 473.

The defendant concludes his brief with certain general assignments of error in the admission and exclusion of evidence. Our attention is not directed to any particular matter of that kind, and the assignments are too general to require consideration.

In conclusion, it is sufficient to say that a careful examination of the record fails to disclose any reversible error, and the judgment of the district court is therefore

AFFIRMED.

GEORGE YOUNGER V. STATE OF NEBRASKA.

FILED DECEMBER 5, 1907. No. 15,292.

1. **Proof of reputation** is properly confined to the reputation of the individual in the vicinity in which he lives or in which he had formerly resided.
2. **Criminal Law: EVIDENCE.** Where articles are offered in evidence which are pertinent to the issue, the court will not exclude them on account of the manner in which they were obtained.
3. ———: **INSTRUCTIONS.** It is not error to refuse an instruction removing certain evidence from the consideration of the jury at the close of the trial, where the evidence was received without objection at the time of its admission, and no motion then made to strike it out.
4. ———: **EVIDENCE: HARMLESS ERROR.** Where a defendant in a prosecution for rape calls out from the prosecutrix on cross-examination the description of her assailant that she gave at the time she made complaint, it is not prejudicial to him to allow the person to whom the complaint was made to testify that immediately after the assault the prosecutrix complained that she had been assaulted by a negro, and to give her description of him then made.
5. ———: **INSTRUCTIONS.** Where the testimony of the prosecutrix in a rape case as to the fact of the assault is fully corroborated, and her evidence as to the identity of her assailant is also sustained by evidence in corroboration, it is not prejudicial error for the court to omit to instruct as to the necessity of corroboration, when the only instruction requested by the defendant upon that point does not fully and correctly state the law.
6. **Evidence examined, and held to sustain the verdict.**

ERROR to the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Affirmed.*

James L. Caldwell, for plaintiff in error.

W. T. Thompson, Attorney General and *Grant G. Martin*, contra.

LETTON, J.

Plaintiff in error was convicted in the district court for Lancaster county of rape with force and violence upon

one Myrtle Furlong, and prosecutes error to this court. A brief statement of the facts is necessary to the understanding of the questions presented. On the night of February 6, 1907, the prosecuting witness, a girl between 15 and 16 years of age, who worked in the office of the Nebraska Telephone Company near Thirteenth and O streets in the city of Lincoln, stopped work at 10 o'clock. A few minutes afterwards she left the office with two other young women, who accompanied her to a candy store, where they spent five or six minutes. From thence she walked to the corner of Fourteenth and O streets, expecting to take an Interurban street car to her home. The car had gone, and she started to walk. She went north upon the west side of Fourteenth street, and had gone between four and five blocks when she saw a man cross the street. He came up and walked beside her for a few steps, and after requesting her to have sexual intercourse with him, which she refused, he seized hold of her, choked her, forced a handkerchief into her mouth as a gag, and dragged her into an alley. He first threw her down on a manure pile near the street, and then dragged her to an empty sleigh about half way in the alley between Thirteenth and Fourteenth streets. He there violently and forcibly tore nearly all her clothing from her person, and committed a forcible and brutal assault. As soon as she was released, he ran away, running west from the scene of the assault. As soon as the prosecutrix could gather the remnants of her clothing about her, she went to the back door of the nearest house and asked admittance. There were three ladies in the house, whom she told she had been assaulted by a negro, and described his appearance and clothing as nearly as she could. The description she gave was communicated by telephone to the police station, and the defendant was arrested about midnight as answering the description given. He was positively identified by the prosecuting witness, both by his appearance and the sound of his voice, and also by another witness who said he saw him about 10 minutes

after 10 o'clock that night standing near the intersection of Fourteenth and R streets, near an electric light, a distance of about one and one-half blocks from the alley where the crime was committed, and on the same side of the street where the assailant stood when first seen by Miss Furlong. The defense was an alibi. The defendant's occupation is that of a porter or janitor, taking care of a bank and office at the corner of Eleventh and O streets, a distance of about six and one-half blocks from the alley where the crime was committed. He went upon the stand, and testified that about 10 o'clock that night he was in the bank; that he went from there to a cigar store close by to get a pail of water, and named a number of persons that he saw while he was in the cigar store, a little after 10 o'clock; that he drank in the basement with one Smith, and that he went again to the bank and was mopping the floor until about 20 minutes to 11 o'clock, when he went back to the basement and remained there until after 11 o'clock. Two of the persons whom he stated he saw a little after 10 o'clock in the cigar store testified they saw him there from about 15 minutes to 10 to 10 o'clock, and a witness whom he says he saw about 10:30 testifies that he saw the defendant about 15 minutes to 11 o'clock that night in the basement with the witness Smith. The defendant's testimony is, to some extent, corroborated by the witness "Red" Smith, who testifies, in substance, that about 10 o'clock he saw the defendant attending to his work at the bank; that the witness was in the basement of the building, and that 10 minutes after 10 the defendant had taken a pail of water into the bank from the cigar store, and then came out and went into the cellar where he was; that he heard him in the bank for 15 minutes after he left the cellar; that he saw him again that night at about a quarter of 11 in the basement, where they again drank together, and that it was about 20 minutes between the two times. He fixes the last time the defendant came out of the bank as "in the neighborhood of 10:30." On cross-examination, this witness says

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that he did not see Younger between 10:15 and 10:40; that he, Smith, left the building after 10:15, and was gone in the neighborhood of 20 minutes; that he was drinking a good deal that night, and that in his references to time he is merely guessing. The day after the assault the prosecuting witness was taken to the police station, and she pointed out the defendant from a number of other colored men as being her assailant. The clothing which the defendant wore when arrested tallied with the description given by the prosecuting witness, and also by the witness Hamilton, who says he saw him at the street corner just a few minutes before the assault.

The first assignment of error is that the court wrongfully refused a continuance. The preliminary examination was held a few days after the assault. The information was filed on February 26. On March 2 the defendant filed a motion for continuance, alleging in substance, as grounds therefor, the existence of excitement and prejudice, want of counsel, lack of time to communicate with his friends, who live in Texas and Colorado, also lack of time to investigate the character of the prosecutrix, and to establish his own good character. This continuance was asked until the next term of court. This motion was presented to the court on that day, but was overruled. The court then set the trial for March 11, and appointed as counsel for the defendant the same attorney that appeared for him in the preliminary examination. On the 5th day of March another motion and affidavit for continuance over the term was filed, somewhat argumentative in form; the substance of it being that counsel, for a number of reasons, was unable to prepare the case for trial in the length of time allowed for that purpose. This motion was overruled, but the case was passed for trial until March 18. On March 18 a third application for a continuance was made, the affidavit of counsel in support thereof being to the effect that a witness in St. Joseph, Missouri, would testify as to the good reputation of the defendant for truth and veracity and

virtue and chastity; that counsel had been unable to investigate the reputation of the prosecuting witness in like matters for want of time; and that counsel had been sick during the preceding week and was not able to enter upon the trial of the cause. This motion was overruled and an exception taken. From a consideration of these affidavits, we think the court did not abuse its discretion in overruling the motions. As to the first and second, the court extended the time for preparation for trial. The disheveled, bruised and bloody condition of the prosecutrix immediately after the assault formed such positive evidence of its commission that the same necessity did not exist for the investigation of her character and reputation as in most cases where it is claimed that such an assault had been committed. The testimony of the witness in St. Joseph, as set forth in the third affidavit, standing alone, would not be admissible, since it only alleges that the witness had known the defendant in St. Joseph, and that his reputation in such matters is good, without anything to show how long ago it was that the defendant was in St. Joseph, or that he had ever been a resident there. Proof of reputation is properly confined to the reputation of the individual in the vicinity in which he lives or in which he had resided. There are no facts alleged to bring the testimony offered within this requirement.

The second, third and fourth assignments of error are based upon the contention that the prosecutrix was not corroborated, and that no proof was offered that she "was not a daughter or sister of the defendant." As to the fact of the criminal assault, it is seldom we find a case in which the corroborative testimony is so clear and convincing. The condition of the clothing and body of the prosecutrix immediately after the assault, as testified to by the witnesses who were present at the house of Mrs. Chapman at the time she applied for aid, is conclusive on this point. It is urged that the witness was not corroborated as to the identity of the defendant, but the

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testimony of the witness Hamilton is that he saw him close by a few minutes before the outrage. He described his clothing in the same manner as the complaining witness, and the defendant was found by the police officers a short time after the assault dressed in precisely the same manner as the assailant, with a long black overcoat, light trousers, a black derby hat, a dark muffler, and no collar. This evidence furnished all of the corroboration necessary, even if corroborative evidence of the identity of the assailant is necessary in a case of this nature where the assault is evident, more than in a case of a violent assault of another character, which is not our opinion, although some courts of respectable authority have so held. As to the lack of proof that the prosecutrix was not the daughter or sister of the defendant, the record shows that the defendant is a negro and the prosecutrix a white person. They were both witnesses, and testified before the jury, and the law does not require proof of that which is self-evident.

The fifth assignment is that the particulars of the complaint made by the prosecutrix were permitted to be given in evidence. Examination of the record, however, shows that the witness did not relate the particulars, but merely testified that Miss Furlong complained that she had been nearly killed by a negro, and that she gave a description of the person who assaulted her. This was only a few minutes after the assault, and while the witness was still sobbing and trembling from its effects. This was a spontaneous and unpremeditated statement, and admissible as a part of the *res gesta* in corroboration of the prosecutrix. Moreover, the evidence shows that the description was identical with that given by the prosecutrix on the witness stand, and which was used by the police in looking for the guilty person. We have held that the fact of the complaint being made and the name of the assailant then given may be testified to in corroboration. *Welsh v. State*, 60 Neb. 101. See, also, *State v. Andrews*, 130 Ia. 609; *State v. Hutchinson*, 95 Ia. 566; *Bannen v. State*,

115 Wis. 317; *Hannon v. State*, 70 Wis. 448. Besides, the defendant had previously called out the same facts by asking the prosecutrix how she described her assailant to the ladies at Mrs. Chapman's.

Objection is made to the introduction of the defendant's shoes in evidence, upon the ground that they were taken from him by force and that it is compelling him to furnish testimony against himself. A like question has been before this court a number of times, and it has been held that, where matters are offered in evidence on the trial of the cause which are pertinent to the issue, they should be admitted, and the court will not take notice how they were obtained. *Geiger v. State*, 6 Neb. 515; *Russell v. State*, 66 Neb. 497. A full discussion of the admissibility in evidence of articles forcibly taken from the possession of the defendant in a criminal case is to be found in *Williams v. State*, 100 Ga. 511, 39 L. R. A. 269. The cases seem to be uniform in support of the admissibility of evidence thus obtained. 1 Bishop, Criminal Procedure (4th ed.), secs. 210-212.

It is complained that the witness was allowed to testify, over objection, to foot prints in the snow, and that the iron band on the heel of one of the shoes looked similar to the tracks in the snow. This question was not objected to at the time, and no motion was made to strike out the testimony.

A question which has given us some concern is whether or not the instruction requested by the defendant at the close of the trial relating to the shoes introduced in evidence was erroneously refused. This instruction, in substance, is that, before the shoes offered in evidence can be considered by the jury, they must find that there was a careful and correct measurement of the tracks at the time, and that the marks on the shoes must exactly fit the impression made in the snow; that the mere memory of the witnesses as to the shape of the impression made after so long a period is dangerous, and that they should disregard the evidence as to the shoes in arriving at their verdict.

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We have already seen that it was not error to admit the shoes in evidence over the objection that they were forcibly taken away from the defendant without his consent. The only material evidence given as to the foot tracks was given by Mrs. Ledky, as follows: "A. At each place where I found the snow beaten down where they had scuffled there were the same tracks, a woman's track and a man's track, and in each place the man's track showed as if the heel of the shoe was flat, and it looked as if the heel on the right foot of the right shoe had been mended and a piece set in. Q. (Handing witness exhibit 3) I would ask you to examine this right shoe of exhibit 3, and state if that iron band upon the heel would look similar to the track that seemed to be in the snow. A. Yes; I suppose." The witness further testified that she did not compare the track and shoe afterwards, and never saw the shoe closely until the time of the trial. The opinion of the witness as to whether or not the iron band on the heel would look similar to the track that seemed to be in the snow, without any comparison having been made by her of the tracks and merely upon her recollection as to the appearance of the tracks several weeks before, was incompetent evidence, and afforded no aid to the jury in determining whether the shoes of the defendant were the identical shoes that made the tracks in the snow. The evidence was admitted without objection, and no motion was made to strike it out at the time, or to take it from the consideration of the jury. It was clearly improper, as being the opinion of the witness as to facts which the jury were the proper persons to decide; but a defendant cannot allow testimony to be introduced without objection or moving to strike it out, and wait until the conclusion of the trial and then ask to have an instruction directing the jury not to consider it. "It is incumbent on the defendant in a criminal case, as it is on a party in a civil case, if he would avail himself, on error or appeal, of any irregularities committed on the trial of the case, to make his objection and to save his exception

at the time when the irregularity was committed. Objections to evidence cannot, as a general rule, be made by a *motion to instruct* the jury to disregard the particular evidence." It has been well said: "To allow a party to permit, without objection, the admission of evidence, and for the first time make his objection in instructions, would be intolerable practice. If he had an opportunity to interpose an objection, he cannot take the chances that the testimony will be favorable to him, and, when it turns out otherwise, raise his objection; but must be held to have waived it." 1 Thompson, Trials, sec. 700. The shoes themselves would furnish no evidence unless testimony were offered as to the tracks, and the only testimony which could have any weight as affecting the issue was that given orally as to the shape of the heel prints. We think, therefore, the objection to the evidence, embodied in the instruction, came too late. Moreover, the evidence was of the supposititious and inconclusive character above set forth, and we doubt that the defendant was prejudiced by the refusal to instruct the jury to disregard it. The cases which are cited by counsel for defendant hardly go as far as the propositions laid down in his brief.

It is complained that the court did not instruct the jury upon the question of alibi. The record shows, however, the jury were instructed, in substance, that, if they had a reasonable doubt of the presence of the accused at the time and place of the alleged crime, then it was their duty to return a verdict of not guilty. This instruction presented the question of alibi as fully as was necessary.

Error is predicated on the refusal of the court to give instruction numbered 4 asked by the defendant. This, in substance, directed the jury that "there must be evidence corroborating that of the prosecutrix to authorize the jury in convicting the defendant. And, in this case, the evidence of the prosecutrix that the accused was the party who was present there at the time and place and who committed the offense must be corroborated in order to

justify a conviction for the offense charged." This instruction is not correct in law. Corroboration by direct evidence as to the particular fact constituting the crime is not essential. It is enough that the evidence of the prosecutrix be corroborated by facts and circumstances which support her evidence, and from which, together with her testimony as to the principal fact, the inference that the defendant is the guilty party may be reasonably drawn. No corroboration is necessary in such a case as this as to the identity of the defendant. There is no reason for requiring such corroboration that would not exist in the prosecution of any crime committed against the witness. The instruction presented was, for that reason, erroneous. The corroboration as to the particular act was overwhelming, so much so that it cannot be said that any conflict exists upon that point in the evidence. Under such circumstances, the mere failure to instruct the jury, in the absence of any proper request for such instruction, is not reversible error.

It is urged that the court erred in refusing defendant's motion for a new trial, not only upon the grounds of the errors assigned, but on the ground of facts set forth in the affidavit of the defendant's counsel with reference to the public prejudice and bias against the defendant, threats of lynching, changing of the testimony of the witnesses from that given at the preliminary hearing, and other like reasons. This affidavit was resisted by a counter affidavit, filed by the county attorney, denying specifically the facts stated therein, and upon the hearing the motion for a new trial was overruled. The evidence in regard to the allegations of bias and prejudice is contained in these two affidavits alone, and that of the county attorney is sufficient to justify the court in overruling the motion, if it believed the statements therein contained, rather than those in the affidavit of defendant's counsel.

Upon the whole case, taking into consideration the fact that the assault was committed at a point six and one-half blocks from the bank where the defendant was work-

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ing, together with the fact that the crime must have been committed between about 15 minutes past 10 and 30 or 35 minutes past 10, and that there was ample time for the assailant to have reached the bank after the assault in order to be there by 10:45, together with the further fact that the assailant ran west after the assault (in the direction of the bank), and that, during the short period of time necessary to go from the bank to where the man was seen by Hamilton, commit the assault and return to the bank, he was not seen by any one except Smith, who speaks with no certainty as to the time, and as the time he fixes for the defendant's getting the water is contradicted, we think the verdict is supported by the evidence.

Many matters prejudicial to the defendant are stated in the brief to have occurred, which are not contained in the record. These, of course, we cannot consider, and upon the record as it stands before us the judgment of the district court is

AFFIRMED.

WALLACE W. BARNES V. WILLIAM E. SIM, APPELLANT;
MAUD E. RENFRO, APPELLEE.*

FILED DECEMBER 5, 1907. No. 14,977.

Partnership: ASSIGNMENTS: CONSTRUCTION. Two assignments of a partnership agreement examined, and *held* not to include a personal promise of one of the partners to pay a sum of money due from one partner to the other.

APPEAL from the district court for Nemaha county:
PAUL JESSEN, JUDGE. *Affirmed.*

H. A. Lambert and J. D. Graves, for appellant.

E. B. Quackenbush, contra.

DUFFIE, C.

In November, 1904, J. F. Renfro sold to Wallace W. Barnes a half interest in a drug business which Renfro

* Rehearing denied. See opinion, p. 213, *post*.

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was then conducting in the village of Peru, Nemaha county. Partnership articles were also executed between the parties, by the terms of which Barnes became a partner in the business, was to conduct the same, and receive a salary of \$60 a month, payable out of the funds of the partnership. The partnership articles also contained a stipulation providing for the payment by Barnes of \$45 quarterly, beginning April 1, 1905, with interest at 6 per cent. per annum, until the full sum of \$564.83, the consideration to be paid by him for his half interest in the business, was paid. No lien on the property sold was reserved by Renfro, who accepted Barnes' agreement to pay the amount. This partnership agreement Renfro assigned to his wife by indorsing thereon the following: "I hereby assign all my interest in the above property to Maud E. Renfro of Peru, Nebraska, this 5th day of October, 1905." June 2, 1906, Mrs. Renfro assigned her interest to the defendant Sim by an instrument reading as follows: "I hereby assign for a valuable consideration all my rights, title and interest in and to a certain contract entered into November 1, 1904, by and between J. F. Renfro and Wallace W. Barnes, and assigned by J. F. Renfro to Maud E. Renfro." Barnes was unwilling to accept Sim as a partner in the business, and on June 7, 1906, commenced this action making Sim and Maud E. Renfro parties defendant, alleging that Mrs. Renfro still claimed an interest in the partnership agreement entered into between him and J. F. Renfro; asking that an accounting be had between the parties plaintiff and defendant; that their respective interests be determined; that a receiver be appointed to wind up the business; that the business be sold by the receiver, and the proceeds be divided among the parties to the action according to their respective interests. Mrs. Renfro filed an answer, the material allegations of which are to the effect that, in her sale and assignment to Sim, the agreement of Barnes to pay the consideration for his purchase of one-half the stock was not included; that she was the owner of the debt owing by Barnes, and entitled to

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collect the amount still due thereon. Sim claimed that the assignment to him carried the amount still due from Barnes on his purchase of a half interest in the business. The district court found "that said obligation of the said plaintiff Barnes for one-half the purchase price of the stock of drugs did not pass by the assignment of said contract, but remained and belonged to the defendant Renfro, and that she is entitled to the relief asked for in her cross-petition." A decree to that effect was entered, from which the defendant Sim has appealed.

It is evident the court found that the assignment from J. F. Renfro to Mrs. Renfro did not include the personal obligation of Barnes to pay the sum of \$564.83, the purchase price of a half interest in the business; that such assignment only conveyed J. F. Renfro's interest in the property of the firm. This being so, Mrs. Renfro's assignment of her right, title and interest in the contract would convey to Sim a one-half interest in the partnership property only, and did not carry the personal obligation of Barnes for the payment of the consideration of his purchase of a half interest in the business.

We think that this is the proper construction of the two assignments above set out, and that the judgment appealed from should be affirmed. We so recommend.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment appealed from is

AFFIRMED.

The following opinion on motion for rehearing was filed October 8, 1908. *Opinion modified. Rehearing denied:*

1. **Contract: CONSTRUCTION.** Contract of assignment examined, and held, under the evidence, to fall within the provisions of section 341 of the code, which provides that, "when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it."
2. **Syllabus in Barnes v. Sim, ante, p. 211, modified.**

Good, C.

A reargument of this case has been had upon the motion for rehearing. The former opinion may be found, *ante*, p. 211, where a statement of the issues and the facts may be found. The only question that is involved is: Did the assignment from Mrs. Renfro to Sim carry the personal obligation of Barnes? In the former opinion it was held that it did not, and the holding was based on the assumption that the assignments from Renfro to Mrs. Renfro and from her to Sim were insufficient to transfer the personal obligation of Barnes. From a careful examination of the record it does not appear that any one has ever asserted that the Barnes obligation was not transferred to Mrs. Renfro by the assignment of Mr. Renfro to her. All parties in interest have acted upon the assumption that Mrs. Renfro became the owner of this obligation by the assignment from her husband. For this reason, as well as for others hereinafter stated, we think the assignment should be treated by this court as sufficient to vest the title in Mrs. Renfro to the Barnes obligation.

From the record it appears that Mrs. Renfro's "interest in the business" was the subject of the negotiations between her and Sim, which culminated in her executing an assignment in the following language: "I hereby assign for a valuable consideration all my rights, title and interest in and to a certain contract entered into November 1, 1904, by and between J. F. Renfro and Wallace W. Barnes, and assigned by J. F. Renfro to Maud E. Renfro. (Signed.) Maud E. Renfro." Did this assignment operate as a transfer to Sim of the unpaid part of Barnes' personal obligation? This obligation was a written promise to pay certain sums at stated times. It was a debt evidenced by a written promise to pay. It was a mere chose in action. It is elementary that no particular form of words or instrument is necessary to effect an assignment of a chose in action. It is not necessary that the contract of the parties should fully appear in the writing by which the assignment

is made. The consideration, and even the intent of the parties, may be shown by extrinsic evidence. 1 Am. & Eng. Ency. Law (1st ed.), p. 835. As between the parties, Mrs. Renfro and Sim, we think the written instrument set out above was sufficient in form to transfer Mrs. Renfro's ownership of Barnes' debt. In so far as our former opinion may be construed as holding the form of the assignment insufficient, it should be modified.

The evidence clearly shows that Mr. Sim in his dealing with Mrs. Renfro was seeking to acquire her interest in the drug store. It does not appear that he had any particular reason or desire to buy the chose in action against Barnes. It also clearly discloses that Mrs. Renfro did not think or believe that she was selling anything more than her one-half interest in the partnership business of Barnes and Renfro. Her language, her conduct, her every act, clearly shows that she had no intent or purpose to sell or dispose of the personal obligation due from Barnes to her. We think it is further fairly inferable from the record that Mr. Sim knew and understood that Mrs. Renfro was not intending to sell or transfer the personal obligation of Barnes, but that he believed the assignment which she executed was sufficient to transfer this personal obligation to him. He claimed and asserted a right to the personal obligation, apparently because he believed the written assignment was sufficient to convey it to him, and not because there was any belief upon his part that Mrs. Renfro intended to sell or convey the personal obligation to him. Section 341 of the code provides: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." We think this case falls squarely within the provisions of this statute. Mrs. Renfro understood the assignment in the sense that it operated to convey only her one-half interest in the partnership business, and that it did not operate to transfer the personal obligation of Barnes. Mr. Sim knew, or had reason to suppose, that

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she so understood it. It follows that, in completing the agreement with her under such circumstances he must be held to that interpretation of the contract which will give it the meaning and sense in which Mrs. Renfro understood it. The assignment did not convey to him the personal obligation of Barnes.

The appellant complains because no reformation of the contract of assignment was prayed for, but, in view of this section of the statute, we do not think that any reformation of the contract was necessary. The statute requires the court, under such circumstances, to so construe the contract as to give it the meaning in which Mrs. Renfro understood it, because Sim, the other party to the contract, had reason to suppose she so understood it.

We recommend that the motion for rehearing be overruled.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the former opinion in this case is modified, and the motion for rehearing is

OVERRULED.

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CHARLES T. PAYNE, APPELLANT, v. PETER ANDERSON ET AL.,
APPELLEES.

FILED DECEMBER 5, 1907. No. 14,996.

1. **Judgment: VALIDITY: CONSTRUCTIVE SERVICE.** A judgment or decree affecting the title to land owned by a resident of this state, the only notice given being by publication, is absolutely void where no appearance was made by or for such resident.
2. **Quieting Title: LIMITATIONS.** Where the lands of a resident of the state are sold under a decree entered against him on service by publication, no appearance in the action being made by or on behalf of such party, an action to quiet his title to the land may be brought at any time within ten years from the recording of the deed made on a sale under the decree.

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3. ———: ———. Whether a cause of action would accrue to such party on recording the deed made to the purchaser at the sale so as to start the running of the statute, not being necessary to a decision of the case, is not discussed or determined.
4. ———: TAXATION: EQUITY. In an action to quiet title as against a sale for taxes made under a void decree of court, an offer to pay such sum as the court may find due the defendants on account of any lien for taxes paid is a sufficient offer to do equity and a sufficient tender of any taxes due the defendants.
5. TAXATION: VOID DECREE: REDEMPTION. The limitation of two years within which a party may redeem from a sale for taxes, has no application to a sale made under a void decree foreclosing a tax lien.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

A. E. Howard, E. M. Slattery, James E. Philpott and Berge, Morning & Ledwith, for appellant.

A. W. Crites, contra.

DUFFIE, C.

May 27, 1905, the plaintiff filed his petition in the district court for Dawes county, Nebraska, asking that his title to the northwest quarter of section 34, township 29, of range 9 west of the sixth P. M., be quieted. The petition alleges that he became the owner in fee of said land by purchase from the owner, John Strang, in 1893, and that his deed therefor was recorded in the office of the register of deeds January 4, 1894; that at the date of his said purchase, and ever since, he was an actual resident of the city of Lincoln, Lancaster county, Nebraska, where he has continued to reside with his family, and that the defendants had actual knowledge and constructive notice of his said place of residence; that in December, 1899, the defendant, Peter Anderson, began an action in equity in the district court for Dawes county, making the plaintiff a defendant therein, and demanding the foreclosure of certain pretended tax liens on the real estate above de-

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scribed; that, notwithstanding the knowledge and notice of the plaintiff's place of residence, the said Peter Anderson, plaintiff in said action, proceeded to obtain service upon the plaintiff by publication, but it is alleged that no proper or lawful affidavit of nonresidence of the plaintiff was ever filed in that action; that a decree of foreclosure was entered in said action, and the land thereafter sold by the sheriff of Dawes county; that Peter Anderson became the purchaser, and thereafter, and on August 13, 1900, a sheriff's deed to said Anderson was placed of record in the recorder's office of Dawes county, the deed bearing date July 17, 1900. It is further alleged that during the pendency of said action plaintiff had no notice or knowledge of the same, either actual or constructive; that he never made any appearance therein; that he was never served with process; that the court never obtained jurisdiction over him or his said property, and that the proceedings, including the decree, sale, and sheriff's deed, are absolutely void; that such proceedings and deed constitute a cloud upon plaintiff's title, which makes it impossible for him to sell his land or borrow money thereon. It is further stated that the defendant, Peter Anderson, conveyed the land to the defendant, Mary Anderson, and that the deed of conveyance was recorded October 19, 1904; that the consideration named in the deed is \$1; that Mary Anderson is the mother of Peter Anderson, and that she took said conveyance with full knowledge and notice of all the foregoing facts; that no consideration was in fact paid for said deed, and that it still further clouds and impedes plaintiff's title. The relief prayed is that title to the land be forever settled and quieted in the plaintiff; that all proceedings had in the former case be set aside as void, and that the defendants be enjoined from asserting or claiming any right, title or interest in the premises; (2) that, if the court should find that the defendants, or either of them, are entitled to any claim or demand in, to or on said premises because of any tax liens, an accounting be had of the amount; that plaintiff be permitted

to pay the same upon terms to be fixed by the court; and for such other, further or different relief as may be just and equitable. The defendants filed separate demurrers to this petition, alleging, first, that the petition failed to state facts sufficient to constitute a cause of action in favor of the plaintiff; and, second, the petition failed to state facts sufficient to entitle the plaintiff to any relief against defendant. The court entered an order sustaining these demurrers, and, the plaintiff electing to stand upon his petition, judgment was entered against him dismissing the petition and taxing him with the costs. From this judgment the present appeal was taken.

The demurrer admits all material facts alleged in the petition. These material facts are the following: At the date of Anderson's action to foreclose a tax lien against the land, the plaintiff was the legal owner thereof and a necessary party defendant to said action; second, he was an actual resident of Lancaster county, Nebraska, residing with his family in the city of Lincoln, where actual personal service of summons could be had on him; third, Anderson had both actual and constructive notice of his said residence; fourth, notwithstanding these facts, he proceeded to obtain service of summons by publication, and perpetrated a fraud both upon the court and upon the defendant by taking judgment in the action, knowing that the service required by statute had not been had upon the plaintiff, defendant in said action; that he procured a sale of plaintiff's land under said judgment, became the purchaser thereof, and has since transferred it to his mother, without consideration and with knowledge on her part of the facts above stated.

In *Eayrs v. Nason*, 54 Neb. 143, it was held that a decree foreclosing a mortgage was absolutely void as against the owner of the fee—a resident of the state—where the only service was by publication. In that case, as in this, the action was to redeem from the illegal sale and deed, and it was said that, even though the record in which a judgment is pronounced shows upon its face that the

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court had jurisdiction both of the subject matter of the suit and of the parties thereto, a party made liable by such judgment, who had never appeared in the action and who never had legal notice of its pendency, might, in a proper proceeding, either as a cause of action or as a defense, show that the recitals of the record that he was served with process of the court were false. It is true, as urged by the defendants, that the rule in some jurisdictions is that a judgment entered against a resident of the state on service by publication is valid where the plaintiff making the affidavit for such service was honestly mistaken as to defendant's nonresidence. Such is the case of *Davis v. Vinson Land Co.*, 76 Kan. 27. The court in its opinion refers to *German Nat. Bank v. Kautter*, 55 Neb. 103; which follows the rule in *Eayrs v. Nason*, *supra*, and approves the holding in that case under the facts disclosed in the record, while it disapproves the holding that an affidavit for publication on the ground of the nonresidence of the defendant, although made in good faith, did not confer jurisdiction on the court. We quote from the opinion: "In support of their contention the plaintiffs in error cite the case of *German Nat. Bank. v. Kautter*, 55 Neb. 103. In that case, however, the court found the action of the plaintiff in obtaining service and judgment to be fraudulent, while nothing of that nature exists here. The fraudulent conduct of the plaintiff in the case cited fully justified the decision made, and we fully concur in the conclusion reached by the court for that reason. In the discussion of the case, however, the court does not seem to have regarded the question of fraud in procuring service as important, but places its decision flatly upon the ground that a false affidavit cannot confer jurisdiction. * * * We think the opinion, when considered apart from the facts, too broad, and are not inclined to follow it." From the above extract it will be seen that even in Kansas, where the rule prevails that a judgment against a resident of the state on service by publication is good, provided the plaintiff acted honestly in filing an

affidavit alleging the nonresidence of the defendant, under the admitted facts in this case, where the affidavit for publication was made with a knowledge of its falsity, the judgment would be regarded as absolutely void. We are not disposed, however, to recede from the rule announced in *Eagrs v. Nason, supra*. Every resident is entitled to personal notice before being divested of his property. Service by publication may be had only in case of non-resident defendants, and not then when personal service can be had within the state. The court can acquire jurisdiction of the person of a defendant only as provided by statute. A judgment against a defendant of whom the court has no jurisdiction must, on principle, be void. The courts holding otherwise place it upon the ground that the nonresidence of the defendant is a question of fact to be determined by the court before the entry of the judgment. The evidence to establish this fact, as stated in *Davis v. Vinson Land Co., supra*, is the affidavit for publication filed by the plaintiff or his agent or attorney. Why should the validity of the judgment depend upon whether the party making such affidavit was mistaken as to the defendant's residence, or knowingly misrepresented such place of residence? In either event, the affidavit is a false one, and the jurisdictional fact—the nonresidence of the defendant—cannot be supplied by the good faith of the party who asserts it. The published notice in such case is not notice to the defendant, and gives the court no jurisdiction over him or his property.

It is urged by the defendants that no facts are stated in the petition showing a defense to the foreclosure action, and that, whether the judgment be void or voidable, it cannot be set aside without such showing. It is established in this state that a court of equity will not lend its affirmative aid to a person seeking to avoid the enforcement of a void judgment, unless it be made to appear that he has a valid defense thereto. *Hall v. Hooper*, 47 Neb. 111, and cases cited at page 119. It may be doubted whether this rule obtains as to a judgment secured by

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fraud practiced by the plaintiff; but, even if that be the rule applicable to the case at bar, the plaintiff is seeking something further than the vacation of the judgment; he is seeking to redeem his land, the title to which the defendants assert in themselves under a void decree. He is willing that the court shall award to the defendants any amount equitably due them, but he is not willing, nor do we know of any rule which will require him, to surrender his title to real estate sold under a void judgment fraudulently obtained by one of the defendants. Whether the plaintiff has a meritorious defense to the tax lien claimed by the defendants against his land is not the question in issue. The real question is: Shall his title be divested by virtue of a void decree obtained from the court by fraud practiced upon it by one of the defendants?

The defendants further urge that the plaintiff must now tender all taxes due upon the land. The petition asks for an accounting, and for leave to redeem by paying any amount for which the defendants may have a lien on the land on account of taxes paid thereon. That no tender of any specific sum was made, we do not regard as important. As said in *Jones v. Hartsock*, 42 Ia. 147: "There is not the same necessity for tender in actions in equity as at law." "A court of equity, having control over the whole subject, may so mould the decree as to costs, and the conditions under which relief will be granted, as to fully guard and protect the interests of all parties," although no formal tender is made before the bringing of a suit. See, also, *Binford v. Boardman*, 44 Ia. 53, and *Taylor v. Ormsby*, 66 Ia. 109.

It is further asserted that the action is barred by the statute of limitation; that the action does not fall under section 6 of the code limiting the time for the recovery of the title or possession of real estate, but that it falls under the provisions of section 16, which limits the time for commencing actions not provided in the preceding sections to four years. We do not think there can be any doubt that the action is one for the recovery of title to

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real estate, and that the ten-year statute of limitation is the one applicable. If not an action to quiet title, it is one to remove a cloud from the title, and there are cases holding that an action to remove a cloud upon the title to real estate is not subject to any limitation. Such an action by one in possession would, we think, be a continuing action of which a party might take advantage at any time that the cloud interfered with a sale of his property or with his attempt to raise money by way of a mortgage. So long as the owner's possession continued, a cloud could not interfere with his actual possession and enjoyment of the property or the profits to be derived therefrom. No title by adverse possession could be acquired as against the owner in possession, and any unfounded claim of title could not grow into a right, however long continued, in the absence of possession. It might, however, seriously interfere with the sale of the property or a pledge of the title in the way of security for a loan, and an action to remove the cloud would become necessary only when such interference with the free disposition of the title occurred. In *Wagner v. Lar*, 3 Wash. 500, 28 Am. St. Rep. 56, an action brought by a judgment creditor to set aside fraudulent conveyances made by the judgment debtor, the court said: "Under the statute, an action for the recovery of the possession can be commenced within ten years. We think, therefore, that the action is not barred, though we do not now decide that an action to remove a cloud would be even subject to that limitation, or subject to any limitation at all; for, as ten years had not elapsed between the time the purchaser received her deeds to any of these lands and the time of the commencement of this action, it is not necessary to discuss the subject of limitations further." In this case, we are clear that the action is not barred by section 16 of the code, and, as it was commenced within ten years from the date of the sheriff's deed, it is not barred by section 6 of the code. Whether the statute would commence to run upon the making and recording of the sheriff's deed, it is not necessary to determine.

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The special statute of two years within which a party may redeem from a tax sale is also urged by the defendants as applicable to this case. If the defendant had been legally served with process in the action, the two-year statute would apply, but, the decree foreclosing the tax lien claimed by Anderson being void, the two-year statute has no application.

The demurrers interposed by the defendants should have been overruled, and we recommend a reversal of the decree appealed from and remanding the cause to the district court for further proceedings not inconsistent with this opinion.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree appealed from is reversed and the cause remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED.

DELLA MARTIN, APPELLEE, v. FRATERNAL LIFE ASSOCIATION, APPELLANT.

FILED DECEMBER 5, 1907. No. 15,005.

1. **Courts: JURISDICTION: EVIDENCE.** An objection to the jurisdiction of the court over the person of the defendant, either on account of irregularity in the service of the summons or because the action was brought in the wrong county, must be supported by evidence when the record in the case does not show facts going to support the objection.
2. **Insurance: AGENT'S CONTRACT: CONSTRUCTION.** A solicitor for an insurance company was to receive 80 per cent. of the first 12 premiums paid by the parties whom she might procure to take policies in the company. *Held*, That her leaving the service of the company before all the 12 premiums were paid did not affect her right to the commission agreed on.

3. ———: ———: ———. That such solicitor was assisted in securing applicants for insurance by a field agent of the company is not, under the facts disclosed, a defense to her claim for commissions.

APPEAL from the district court for Richardson county:
WILLIAM H. KELLOGG, JUDGE. *Affirmed.*

Harry S. Dungan and James E. Leyda, for appellant.

Francis Martin and Edwin Falloon, contra.

DUFFIE, C.

This action was brought by the plaintiff to recover commissions alleged to be due her on a written contract appointing her a deputy supreme senior of the defendant, with power to solicit members and organize local lodges of the association. By the terms of the contract she was to receive as compensation a sum equal to 80 per cent. of the first 12 assessments paid by the members whose applications were obtained by her or by such assistance as she might employ. The action was brought in Richardson county for services rendered there, and summons was served on Israel L. Beaulieu, an officer of the local lodge located at Falls City, in that county. The defendant appeared specially and filed objections to the jurisdiction of the court in the following words: "Now comes the defendant, by Harry S. Dungan, its attorney, and appearing for the sole and only purpose, objects to the jurisdiction of this court over the subject matter of the action and the person of this defendant." The court overruled this objection to the jurisdiction, and properly so, for the reason that no evidence, either oral or by way of affidavits, was offered in support thereof. The defendant thereupon filed answer, admitting the contract of employment set out in the plaintiff's petition, admitting that plaintiff wrote insurance for the defendant in the towns of Franklin and Bloomington for which she had been overpaid in the sum of \$51.70, and denying that she secured any

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other applications for insurance for the defendant company. It is further alleged that plaintiff left defendant's employment in July, 1904; that her contract of employment was then terminated, and that she was not entitled to receive any compensation thereafter. The answer further contained the following plea to the jurisdiction of the court: "This defendant further alleges that this action was improperly brought in the county of Richardson, for the reason that the contract sued upon was made in the county of Adams; that the head office of the Fraternal Life Association, defendant herein, is at Hastings, Adams county, Nebraska; that demand was made on the defendant for payment in Adams county, Nebraska, and payment there refused, and that the cause of action of the plaintiff, if any, arose in Adams county, and that said cause of action, or any part thereof, did not arise in Richardson county, Nebraska; therefore, this court has no jurisdiction to try the above cause." Accepting this plea as raising the question of venue and a claim of immunity from lawful service of summons in Richardson county, our attention has not been called to any evidence in the bill of exceptions, nor have we discovered any testimony given, in support of this plea. *Prima facie* the court had jurisdiction of the parties, and, until some evidence was introduced by the defendant tending to show its immunity from suit in Richardson county, the court could neither pass upon the question himself nor submit it to the jury as an issue in the case. The jury returned a verdict for the plaintiff in the sum of \$425. The court, before pronouncing judgment, required the plaintiff to remit \$20 from the amount of the verdict, and entered judgment for the remainder, and from this judgment the defendant has appealed.

Numerous errors are assigned, but the only ones argued are those relating to the jurisdiction of the court, the giving of certain instructions, and the amount of the judgment, which, it is claimed, is excessive. What we have already said disposes of the question of jurisdiction.

Relating to the instructions given, they were clearly warranted by the evidence, and contained, so far as we can discover, no erroneous principle of law.

One claim urged against the amount of the recovery seems to be based upon the theory that plaintiff was not entitled to 80 per cent. of any of the first 12 premiums paid on policies secured by her, unless paid before she left defendant's employ. We do not think the contract can be so construed. It was undoubtedly the intention of the parties that plaintiff should receive as compensation 80 per cent. of the first 12 premiums on policies secured by her efforts, regardless of the time of the termination of her services. A general field agent of the defendant spent several weeks in Falls City assisting the plaintiff in organizing a lodge at that place. There was some evidence in the record to the effect that plaintiff was to have the assistance of an agent of defendant company in organizing the first three lodges, and there is evidence of defendant's field agent himself and of statements made by him which was sufficient to warrant the jury in finding that any services rendered by him in organizing the lodge at Falls City was as her assistant and of which she was to have the benefit. This question was fairly submitted to the jury by the instructions of the court, and a finding in her favor cannot be said to be without evidence in its support.

We discover no reversible error in the record, and recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MALCOM SAVINGS BANK, APPELLANT, v. D. J. CRONIN,
APPELLEE.*

FILED DECEMBER 5, 1907. No. 15,011.

1. Affidavits taken and subscribed before a notary public, who is also an attorney in the case, cannot be used in support of an attachment issued therein against the objections of the defendant.
2. Trial: EVIDENCE: ADMISSIBILITY. The courts of this state are not bound by the rules of evidence adopted in another jurisdiction, but must be governed in the admission of evidence by the law prescribed by our own legislature.

APPEAL from the district court for Holt county. JAMES J. HARRINGTON, JUDGE. *Affirmed.*

R. R. Dickson, for appellant.

Arthur F. Mullen, contra.

DUFFIE, C.

The plaintiff commenced this action on a promissory note executed by the defendant to James Duffus, a resident of Poweshiek county, Iowa, September 30, 1905. The note is for \$2,110, and represents the purchase price of certain registered cattle bought by Cronin from Duffus on the date the note was given. This note Duffus sold and transferred to the Malcom Savings Bank. The plaintiff, at the time of commencing the action, obtained an attachment against the property of the defendant, alleging as grounds therefor "that the defendant fraudulently contracted the debt for which suit has been brought, and that the defendant fraudulently incurred the obligation for which suit has been brought." Defendant filed a motion to dissolve the attachment, alleging, among other grounds, that the statement of facts in the affidavit therefor were untrue. This motion came on for hearing before the court November 17, 1906, and an order was then entered requiring plaintiff to file his affidavits in support of the attach-

* Rehearing denied. See opinion, p. 231, *post*.

ment by November 26, and giving the defendant until December 1, 1906; the plaintiff was allowed until December 10 to file counter affidavits, and on December 11, 1906, the motion was heard by the court upon affidavits filed by the parties, and the attachment dissolved. The plaintiff has appealed from the order dissolving the attachment, and the defendant has filed a cross-appeal complaining of the action of the court in receiving certain affidavits offered by the plaintiff in support of its attachment.

The cattle for which the note in suit was given were purchased by Cronin in Poweshiek county, Iowa, at a sale of fine stock had by Duffus. One A. P. Meigs was clerk at the sale. The affidavits of Duffus and Meigs were used in support of the attachment, and are to the effect that in order to obtain credit on his purchase, and to induce Duffus to accept this note, Cronin represented to them that he was the owner of 1,200 acres of land in Holt county, worth \$20 an acre; that it was free and clear of all liens, except a mortgage of \$5,000; that he was the owner of a large number of fine cattle, horses and other valuable property, which were free and clear of all liens; and that the \$5,000 incumbrance upon his land was his only indebtedness. These were the principal affidavits offered in support of the attachment, and the only ones tending to show any false or fraudulent representations made by the defendant to obtain credit. These affidavits were taken in Iowa before H. E. Boyd, a notary public, who was also an attorney of record in this case. When these affidavits were offered in evidence, the defendant objected to their introduction, for the reason that they were executed before a notary public who appeared as counsel in the case, and he further moved to strike the affidavits from the file for the same reason. The court overruled both the objection and the motion to strike the affidavits from the file, to which ruling an exception was entered.

It was a rule of common law that affidavits taken before an attorney in the case could not be used in evidence, if

objected to. *Collins v. Stewart*, 16 Neb. 52. In 1887 our legislature made an attempt to change this rule of the common law by an amendment to section 118 of the code, the amendment being to the following effect: "And nothing herein shall be construed to prohibit an attorney at law, who is a notary public from swearing a client to any pleading or other paper or affidavit in any proceeding in any of the courts of this state." Laws 1887, ch. 93. The effect of this amendment was before the court in *Horkey v. Kendall*, 53 Neb. 522, and it was there held: "The amendment of 1887 to section 118 of the code, notwithstanding its general language, cannot be held to apply to affidavits, other than those verifying pleadings, without giving the amending act a construction which would render it violative of section 11, art. III, constitution." A careful reading of the opinion in this case satisfies us of its correctness, and that to give full effect to the amendment would be to further hold that it amended section 371 of the code, which is not mentioned or referred to in the amendatory act. Boyd, the notary who took the affidavits, was present at the trial, and his testimony was taken to the effect that the laws of Iowa, where the affidavits were taken and subscribed, do not prohibit an attorney from taking and certifying an affidavit to be used in the case. We do not see how the practice in Iowa can have any bearing upon the question. The rules of evidence to be enforced by our courts are those established by our own legislature, and not the legislature or rules of court adopted in another jurisdiction. *Sulpho-Saline Bath Co. v. Allen*, 66 Neb. 295. The court erred in receiving the affidavits objected to, and their statements cannot be considered by this court. These affidavits being out of the case, there is nothing in the record to sustain the attachment as against the showing made by the defendant.

We therefore recommend an affirmance of the order dissolving the attachment.

EPPELSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the order dissolving the attachment is

AFFIRMED.

The following opinion on motion for rehearing was filed April 23, 1908. *Rehearing denied:*

1. **Affidavits: OBJECTIONS.** Section 371 of the code, providing that an affidavit may be made before any person authorized to take depositions, cannot inferentially be construed as requiring that objections to affidavits as evidence shall be made in the manner provided by statute for the filing of objections to depositions.
2. **Appeal: ESTOPPEL.** A party cannot take advantage of the court's erroneous rulings which he invokes.
3. **Attachment: MOTION TO DISSOLVE; BURDEN OF PROOF.** Where the grounds relied on to support an attachment are positively denied by the oath of the defendant, the burden is upon the plaintiff to prove his grounds for attachment by a preponderance of evidence.

EPPERSON, C.

In its motion for rehearing the plaintiff urges that, because we held that the affidavits upon which plaintiff relied to support its attachment were incompetent because sworn to before its attorney, who was a notary public, we should have remanded the case for a rehearing upon its merits. Plaintiff insists that defendant's objections to the affidavits should have been interposed before trial in the manner provided by statute for the filing of objections to depositions. Section 371 of the code, providing that an affidavit may be made before any person authorized to take depositions, cannot inferentially be construed as requiring that objections to affidavits as evidence shall be made in the manner provided by statute for interposing objections to depositions.

Again, it is not made clear as to how the rule invoked by appellant would avail him. The trial court admitted the affidavits in evidence. He undoubtedly would have admitted them, had the objection been made in a different form. Plaintiff cannot take advantage of the erroneous rulings of the court which he invokes. A party litigant

must in the first instance be the judge of the competency of his evidence, and, upon objection being interposed by the adverse party, it is his privilege to submit to the objection made, and if he submits to the objection, or his evidence be held incompetent because of the form in which it is presented, the trial court should, in cases such as the one at bar, grant a continuance, if necessary, that the evidence may be presented in its proper form. Where a party refuses or fails to submit to his adversary's objection, but insists upon presenting the incompetent evidence, he does so at his peril. This court can consider none but the competent evidence presented by the record.

There is another reason for refusing a rehearing of this case. The facts appearing in the objectionable affidavits are competent as evidence, although not presented in acceptable form. For this reason, we have examined the affidavits to ascertain whether or not appellant has been prejudiced by its failure to properly present them. Plaintiff relies upon alleged misrepresentations of defendant as to his financial condition made when the debt was incurred. The affidavits refer to conversations in which it is claimed that defendant misrepresented his financial condition. No two of plaintiff's witnesses swear to the same conversation. Defendant denies each controlling fact sworn to by plaintiff's witnesses. It was one man's evidence against another's. If defendant's evidence is true, plaintiff is not entitled to an attachment. The rule is well established in this court that, where the allegations made in support of an attachment are denied by the oath of the defendant, the burden is upon the plaintiff to prove his alleged grounds for attachment by a preponderance of the evidence. *Geneva Nat. Bank v. Bailor*, 48 Neb. 866; *Dolan v. Armstrong*, 35 Neb. 339. The plaintiff did not successfully carry the burden of proof.

We recommend that the motion for a rehearing be overruled.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, plaintiff's motion for a rehearing is

OVERRULED.

IN RE ESTATE OF MARY J. MALL.

MARTHA CALDWELL ET AL., APPELLEES, V. CHARLES E. KERR, EXECUTOR, APPELLANT.

FILED DECEMBER 5, 1907. No. 14,993.

1. **Administrators, Debts of.** Where it is sought to charge a legal representative with debts owing by him to the deceased, the burden of proof is upon the party applying; but, when the contracting of such indebtedness is admitted or otherwise established, the burden is upon the legal representative to show that the same has been paid or accounted for.
2. **Evidence examined,** and the judgment of the district court modified.

APPEAL from the district court for Thayer county: LESLIE G. HURD, JUDGE. *Affirmed on condition.*

C. L. Richards and J. M. Stewart, for appellant.

W. E. Goodhue, P. J. Carolus and J. M. Wilson, contra.

EPPELSON, C.

This proceeding was instituted in the county court of Thayer county by legatees named in the will of Mary J. Mall, objecting to the final report of C. E. Kerr, executor of her estate. The legatees alleged that the executor was indebted to testatrix for certain money borrowed by him during the lifetime of testatrix, and for which he had failed to account. The county court denied the relief sought, but upon appeal the district court ordered that the estate recover from the executor \$3,816.15, with interest, and the latter brings the case to this court for review.

The only contention of appellant argued in the brief and properly raised before the trial court and in the as-

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signment of error is that the judgment is not supported by the evidence and is contrary to law. The evidence shows that in July, 1900, appellant gave his personal note to testatrix for \$2,716.15, due five years after date, and at other times two notes for \$600 and \$1,200, respectively. The \$2,716.15 note was given to testatrix for one-half interest in a lumber yard which she received from her husband's estate, of which estate appellant was administrator. Appellant, in addition to the note, and as a part of her share of her husband's estate, paid to testatrix a certain sum of money, which he testified was more than \$100 and less than \$1,000. The trial court found that the executor is chargeable with the \$2,716.15 note, the \$600 note, and with the sum of \$500. We find no evidence in the record to support the court's finding as to the \$500 item. Apparently the trial court considered that such an amount from her husband's estate remained unpaid. If so, the finding is unwarranted, because that estate appears to have been fully settled, and there is no evidence that appellant, at that time, borrowed more than the \$2,716.15. The executor included the \$600 note in his inventory, claiming credit for certain indorsements, and showing a remainder due the estate of \$160, for which he has accounted. There can be no doubt that the court's finding is erroneous to the extent at least of charging the full amount of the \$600 note to the executor, and we are of opinion that the evidence will not justify us in surcharging any part of it.

As to the note for \$2,716.15, the facts are different. For a proper understanding of the situation, a brief review of the evidence is necessary. Appellant married the only daughter of Mrs. Mall, the testatrix, and lived near her. The families were intimate. She appointed him executor. Kerr and his wife and their children were bequeathed \$3,000 by Mrs. Mall, and by her will she required Kerr to give bond in the sum of \$13,000 as executor. Appellant admits the giving of the note. This fact being admitted, the burden was on him to account for the note, or, in other

words, to prove its payment. The law seems to be that, upon an accounting, the affirmative of establishing more assets than are acknowledged by the inventory or account of a personal representative is with the party objecting, but, where the assets are shown or admitted, the burden is upon the personal representative to account for their proper disposition. 18 Cyc. 1180, 1181, note 42. See, also, *Wilbanks v. Crosno & Evans*, 112 Ill. App. 503; *In re Bayley*, 67 N. J. Eq. 566; *Adams v. Adams*, 113 Ga. 824.

Appellant contends that he successfully carried the burden of proving that he paid the note before the death of Mrs. Mall. He testified that he made several payments in cash from time to time to Mrs. Mall and indorsed the amounts on the note; that one large sum was paid in this way: Mrs. Mall had purchased residence property of a party owing appellant. The purchase price was paid by appellant giving credit to the vendor; but he does not remember either the date or the amount, nor does he produce his books or account for their absence. He is corroborated by other witnesses as to the fact that a payment was made to Mrs. Mall in this way upon some indebtedness owing by him. We also find that there was another \$1,200 secured note which had been paid, and, in view of the fact that the \$2,716.15 note was not then due, it is possible that the above payment was in satisfaction of the secured debt. He further states that the note was turned over to him when paid; that he did not keep it; that he is unable to produce it; that he took no receipt from Mrs. Mall, and that he kept no record of the payment. Incredible as it seems, appellant, a business man, would have us believe that he had these large dealings and a settlement with Mrs. Mall, who was somewhat advanced in years, without taking a receipt for the money he paid, or having a witness to the settlement, or making a memorandum of dates and amounts. Mrs. Mall lived in her own home, was economical, and kept boarders to assist in making a living. She had at least \$2,000 other than the several amounts loaned to appellant. If Kerr paid her the

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\$2,716.15, the record is silent as to what disposition she made of it; and it seems incredible that a woman of her habits and station in life would dispose of such a sum without it being known. Again, Mrs. Mall executed her will six months prior to her death, and bequeathed \$4,600 to relatives. It is difficult to understand how Mrs. Mall, a person of ordinary intelligence, would attempt to dispose of such a sum if she did not possess anything near that amount. Appellant was a very unsatisfactory witness, so much so that the trial court was compelled to reprimand him for making evasive answers. We are convinced that Kerr could have produced documentary evidence, memoranda of dates and amounts, which would have given credit to his testimony, were it true. And, further, in view of the fact that Kerr within an hour or two after Mrs. Mall's death showed considerable anxiety about getting control of her papers, and had an opportunity to destroy his own notes, and admitted about the time he was appointed executor that he had \$1,000 with which to settle appellees' bequests of \$1,600, we conclude that the learned trial court was right in finding that the executor had not paid this indebtedness.

We therefore recommend that the judgment of the district court be affirmed, if the appellees remit from the judgment all in excess of the sum of \$2,716.15, with interest at 7 per cent. from March 29, 1904; otherwise, that it be reversed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, if the appellees within 30 days remit from the judgment all in excess of the sum of \$2,716.15, with interest at 7 per cent. from March 29, 1904; otherwise, the cause is reversed and remanded.

JUDGMENT ACCORDINGLY.

SUSIE H. GILLILAN, ADMINISTRATRIX, APPELLEE, v. ADELIA
P. FLETCHER ET AL., APPELLANTS.

FILED DECEMBER 5, 1907. No. 15,000.

1. Limitation of Actions. "Where, after the maturity of a note secured by a real estate mortgage, interest payments are made annually on such note, a right of action accrues on the mortgage at any time within ten years after the date of the last payment on said note." *Teegarden v. Burton*, 62 Neb. 639.
2. Evidence examined, and held sufficient to sustain the finding and judgment of the district court.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Francis M. W. Price and A. E. Harvey, for appellants.

Berge, Morning & Ledwith, contra.

EPPELSON, C.

This is an action to foreclose two real estate mortgages given by Asa Fletcher and wife to W. G. Houtz. A decree of foreclosure was entered as prayed. Since the decree Houtz died, and the action is prosecuted in the name of his administratrix.

The principal defense relied on by defendants is the statute of limitations. The notes and mortgages became due April 20, 1891. They were not paid when due, and this action was instituted January 4, 1906. Defendants concede that the interest was paid up to and including the year 1895. Plaintiff's witnesses testified that the last interest payment was in the summer of 1896. This was denied by defendant's witnesses. The trial court resolved this issue of fact in plaintiff's favor, and, after a careful review of the record, we conclude that his finding was correct. Plaintiff testified that the last payment was interest to April 20, 1896, and the indorsements on the notes so show. Plaintiff was corroborated by his son-in-

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law, who testified that he received this payment of interest for plaintiff in the summer of 1896 from the mortgagor in person. Defendants seek to discredit this testimony by a letter from plaintiff to defendants, of date September 25, 1896, in which the former urged a settlement of the indebtedness, and said in part: "You know it is unfair that I cannot get even the interest on my money invested." The general trend of this letter, which is too lengthy to set out in full, is pessimistic, and the excerpt undoubtedly referred to other investments made by plaintiff which he mentioned in the letter. It does not impeach the plaintiff's evidence as to the fact of the payment of interest on the indebtedness to April 20, 1896. As the action was commenced within ten years thereafter, it was not barred. *Teegarden v. Burton*, 62 Neb. 639.

Each mortgage contained a clause that, upon failure to pay taxes, the principal sum became due and payable. The Fletchers defaulted in the payment of taxes in the year 1893 and the land was sold at tax sale. It is now contended that the mortgages matured upon this breach of the conditions and that an action to foreclose was barred ten years later. The mortgage matured and became due April 20, 1891. Default in the payment of subsequent taxes could in no way affect the plaintiff's right to foreclose or cut short the period of limitation, which, as above indicated, was tolled by payment of interest.

Other assignments argued do not require discussion, and we recommend that the judgment of the district court be affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

LUCY A. COLBY, APPELLANT, V. MARY J. FOXWORTHY.
APPELLEE.*

FILED DECEMBER 5, 1907. No. 15,330.

1. **Alteration of Instruments: BURDEN OF PROOF.** The burden is upon the party alleging the material alteration of an instrument to prove that it was altered by the holder thereof after the execution and delivery of the same.
2. **Evidence examined, and held** insufficient to prove that the instruments in controversy had been altered after their execution by defendant.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Reversed with directions.*

Flansburg & Williams, for appellant.

L. O. Burr, contra.

EPPERSON, C.

This is an action for the foreclosure of a mortgage, and for the fourth time appears in this court. See 64 Neb. 216, 72 Neb. 378, 78 Neb. 288. A history of the case is given in the opinion by Mr. Commissioner ALBERT in 78 Neb. 288. Since then a new trial has been had, resulting in a judgment for defendant. Plaintiff again appeals.

It is contended by defendant that the rules announced in the opinion in 72 Neb. 378, *supra*, became the law of the case, and terminate the issues now involved in her favor. But the issues therè involved and disposed of are no longer in the case, and it will be impossible to apply the law there announced to the case in hand. The court then construed a certain amended petition, holding that it stated a cause of action, and that the alleged spoliation of the instrument sued on would not avoid the contract. No doubt the rules announced became the law of the case; but they ceased to operate on any issue in this case upon

* Rehearing denied. See opinion, p. 244, *post*.

the withdrawal of the amended petition before the last trial. In commenting upon the opinion filed in this case (72 Neb. 378), the learned commissioner said: "Three propositions are involved in this controversy, and but three are determined in our former opinion, and are now governed by the rule of 'the law of the case.' The first of these is that the alteration of the instrument by inserting the word 'gold' before dollars was a material alteration; the second is that the defendant is not estopped from pleading this defense by paying without objection the nine interest coupons attached to the note, which contained this condition; third, that the alteration was made without defendant's knowledge and after the execution of the note and mortgage." As to the first and second propositions, no doubt exists but that they were established as the law of the case. However, we find nothing in the first opinion concluding that the alleged alteration was made after the execution of the note and mortgage. It is true, the trial court had found that such was the case, and the finding was mentioned in the opinion as a fact, but the sufficiency of the evidence was never determined by this court; instead, the case was remanded for further proceedings. It cannot be said that it was established as the law of the case that the word "gold" was inserted in the bond and mortgage after its execution. It was not so considered in the third opinion, wherein it was determined that a judgment could not at that time be predicated upon the findings made on the first trial. The lower court saw fit to grant a new trial, and, having done so, the district judge was required to make his findings from the evidence there adduced. There are three rules established as the law of this case: (1) That, if the word "gold" was inserted by the mortgagee after the execution and delivery of the mortgage and bond, it was a material alteration; (2) that the defendant by the payment of the interest coupons from time to time was not estopped from alleging a material alteration; and (3) the findings of fact at the first trial cannot be adopted by the trial court. These eliminate all

issues existing prior to the last trial, and confine our inquiry here to the sufficiency of the evidence to sustain the judgment rendered.

The bond in controversy is a printed form with blanks for amount, date, etc. Before the word "dollars" a blank line was filled, so that it now reads: "I promise to pay the sum of eight hundred and no-100 gold dollars," etc. The words and figures "eight hundred and no-100" were filled in with pen and ink, and the word "gold" stamped in the blank with a rubber stamp. In like manner a blank in the mortgage was filled out. The defendant asks the court to regard the inserting of the word "gold" as an obvious alteration, and to cast upon the plaintiff the burden of proving that it was made before the execution of the contract. It may properly be called an obvious alteration; that is, it is obvious that the word "gold" was inserted. It was no part of the form upon which the contract was written, nor was it necessary to make a complete contract between the parties. But we cannot agree with the defendant as to the rule of evidence she invokes. It is unnecessary to review the conflicting authorities as to the burden of proof in such cases. This court held in *Dorsey v. Conrad*, 49 Neb. 443, "Where a written instrument shows upon its face a material and obvious alteration, the presumption of law is that such alteration was made before the instrument was finally executed and delivered." It would seem from this that, unless the instrument itself indicated an alteration after its execution, and in the absence of extraneous evidence, the party seeking to enforce the instrument would prevail. It also follows that the party alleging a material alteration carries the burden of proving it. This, we think, is the better rule and in accord with the weight of authority. In *Hagan v. Merchants & Bankers Ins. Co.*, 81 Ia. 321, it is said: "If we are to presume from the fact of alteration that it was fraudulently made, then the burden is upon the plaintiff to rebut this presumption; but if no presumption arises,

or if the alteration is presumed to have been made before delivery, then the burden is upon the defendant. * * * If the instrument shows upon its face, as it is possible it may, that the alteration was fraudulent, then it proves more than the mere fact of alteration; but when the fact of alteration alone appears from it, and it is silent as to the time or authority by which it was made, there is no evidence upon which to base the presumption that it was fraudulently done." See, also, *Fudge v. Marquell*, 164 Ind. 447; *Wilson v. Hayes*, 40 Minn. 531, 4 L. R. A. 196; *National Bank v. Feeney*, 12 S. Dak. 156, 46 L. R. A. 732, 737. In *McClintock v. State Bank*, 52 Neb. 130, it was held, in a case wherein the note itself did not disclose the alteration, that the burden of proof is upon the party alleging the alteration. Such is the rule also where the presumption is that a change appearing upon the face of the instrument was made at or before its execution. 2 Cyc. 234, note 92, pp. 239, 240, note 18. No witnesses were called at the last trial, and the evidence there given consisted of depositions, the testimony given by witnesses at former trials, and written instruments, and, under the rule announced in *Faulkner v. Simms*, 68 Neb. 299, and *Roe v. Howard County*, 75 Neb. 448, we have examined the evidence and arrived at an opinion uninfluenced by the decision of the district court.

There is a conflict in the evidence. The defendant produced the testimony of Miss Dowden, who, when the loan was made, was employed as a clerk in the mortgagee's office. She also negotiated the loan for defendant. She testified positively that she read the bond and mortgage immediately before they were signed, and that the word gold was not therein. Defendant herself gave testimony on two occasions. First, in 1899, she testified in reference to the bond and mortgage: "Miss Dowden read them over to me. Of course, I did not read them over. * * * I didn't read them very carefully myself. I cast my eye over that to see the amount. * * * There was \$800, and the word 'gold' was not there. * * * Q. You were

not looking in that mortgage to see that word 'gold'? A. No, sir; because, of course, my attention was limited, and I could not tell. All I was looking for was to see the number of dollars, of \$800 gold dollars, and it was not there. Q. Where did this conversation in regard to gold occur? A. I think about the first time I went there." In 1906 the defendant gave her deposition, in which she said: "Q. At that time did you read over the note, coupons, and mortgage? A. Yes, sir; two different times. Q. State whether any agreement was made or attempted to be made with you to pay this loan in gold as testified to by John West? A. No, sir; there was not, and this young man is mistaken. Q. When was the word 'gold' stamped in the note, mortgage and coupons, if you know? A. Between the first day of September and the time when I got the money. It was not in there when I signed them, and when Miss Dowden and I read them over." Contrary to the defendant's testimony, we find the depositions of John West and E. C. Jones. The former was a clerk in the office of the mortgagee. He prepared the papers in controversy, and says: "Mrs. Foxworthy and Miss Dowden were in the office to sign up these papers. After some conversation between Mrs. Foxworthy and Miss Dowden, they left the office; Mrs. Foxworthy refusing to sign the papers at that time, as they were made payable in gold—the bond, mortgage and coupons—which was explained to her by both Miss Dowden and myself. There was no mortgages or loans made by the Lombard Investment Company at that time without the gold clause being inserted. They then left the office. Whether they returned again that same day or the next morning, I am not sure; but return they did, and Mrs. Foxworthy then signed the papers in our office. Before signing these papers, it was again made clear to her that they would be made payable in gold. * * * The word 'gold' was stamped in the body of the bond, coupons and mortgage, and the red-ink ruling in the body of the instrument was made before they were signed by Mrs. Foxworthy." E. C. Jones, cash-

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ier of the mortgagee, in his deposition says that he examined the papers immediately after their execution, and that the word "gold" was there at that time, and he approved the papers and stamped them with his "O. K.," closed the loan, and paid defendant the money. The execution of the mortgage was also acknowledged before him as notary public. The mortgage itself shows that it was acknowledged on October 24, 1891, instead of September 1, as testified to by defendant. Miss Dowden's memory is shown to be defective, in that she remembered John West only as a schoolboy, and not as a fellow employee. It appears, and we are convinced, that he was an employee of the mortgagee, and was about 23 years of age when the papers in the controversy were executed, and that they were prepared for execution by him.

A preponderance of the evidence does not disclose that the alteration was made subsequently to the execution of the bond and mortgage. The plaintiff was entitled to a decree of foreclosure, and we recommend that the judgment be reversed and the cause remanded, with instructions to the lower court to make a computation of the amount due plaintiff and to enter a decree of foreclosure.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to enter a decree of foreclosure.

REVERSED.

The following opinion on motion for rehearing was filed April 10, 1908. *Rehearing denied:*

PER CURIAM.

This case is again before us on motion for a rehearing, which is asked for on the theory that we have overlooked and failed to consider certain evidence contained in the record, which it is claimed would have required us to affirm the judgment of the district court.

It is practically conceded in the briefs in support of the motion, and rightly, we think, that the only question left for determination is whether or not the word "gold" was stamped in the notes and mortgage sought to be foreclosed in this action before they were executed by the defendant. From the citations of authorities it seems quite evident that counsel have overlooked the fact that, under the statutes and the rules now in force for the trial of appeals in equity cases, we are not at all bound by the findings and judgment of the trial court, but must try such cases *de novo*, reach our own independent conclusions as to the weight, credibility and effect of the evidence, and render our judgment without reference to the conclusion reached by the district court, or the fact that the record contains some evidence to support it. *Grandin v. First Nat. Bank*, 70 Neb. 730; *Naudain v. Fullenwider*, 72 Neb. 221; *Michigan Trust Co. v. City of Red Cloud*, 69 Neb. 585; *Winston v. Armstrong*, 74 Neb. 604; *Omaha L. & B. Ass'n v. Hendee*, 77 Neb. 12; *Roe v. Howard County*, 75 Neb. 448, 5 L. R. A. (n. s.) 831; *Stocker v. Nemaha County*, 72 Neb. 255.

Before considering the evidence, it is necessary to dispose of the defendant's contention that the plaintiff should have no standing in this case because she has twice changed her theory as to when the word "gold" was stamped in the mortgage in question. It sufficiently appears that the mortgage was given to the Lombard Investment Company, and several months afterwards was sold to the plaintiff, who resides in New Hampshire. She personally knew nothing of the parties or the circumstances of the giving and making of the mortgage, and upon default of payment instituted foreclosure proceedings. Mrs. Foxworthy, the principal defendant, pleaded an alteration in the notes and mortgage subsequently to their execution by her. When the action was commenced, the Lombard Investment Company had failed, its managing officer in Lincoln was dead, and its employees were scattered. Upon the first trial in the court below, the only evidence upon the question of the alteration of the instruments was

furnished by the defendant. Not being able to meet this evidence, and having no means at hand at that time of showing that it was untrue, the plaintiff changed her theory of the case, and filed an amended petition, in which she admitted the alteration by the insertion of the word "gold" before the word "dollars," thereby making the notes and mortgage payable in gold. But she alleged that such alteration was not made by her, that it was an unauthorized act by some unknown person, and sought to recover upon that theory. Later on, however, John West, the son of the manager of the Lombard Investment Company at Lincoln, the person who prepared the notes and mortgage in controversy, was located, and the residence of Mr. Jones, the former cashier of that company, was ascertained, their evidence was procured, and it was thus made apparent to the plaintiff that the word "gold" was stamped into the notes and mortgage prior to their execution. Thereupon, she again changed her theory of the case, withdrew her amended petition, and elected to stand upon her original pleading.

Much fault is found because in our original opinion no special attention was given to the amended petition, which was offered in evidence, and by which the alteration of the notes and mortgage was admitted. We have not overlooked the admission, but did not mention it because we deem it quite immaterial. The plaintiff, when she filed her amended petition, had no personal knowledge of the controverted facts, and her admission was made by counsel and under circumstances which led her to believe that it was true, as claimed, that the instrument had been altered, as she then inferred, by some one other than herself, and without her knowledge. However, when she discovered a different state of affairs, she promptly withdrew the amended pleading, and the admission thus made should not be allowed to prejudice her substantial rights.

We have carefully read the evidence tending to show the alleged alteration, all of which is given by Mrs. Foxworthy and one Miss Dowden, both of whom have testified on two

different occasions in this case. On the first occasion, both of these witnesses testified that the notes and mortgage were signed on the 13th day of October, and the money was immediately turned over to Mrs. Foxworthy by the cashier, Mr. Jones. On that occasion they both said that Miss Dowden read over the notes and mortgage to Mrs. Foxworthy, who did not read them; that Mrs. Foxworthy only looked over Miss Dowden's shoulder to see that the amount written therein was \$800; that beyond that she did not read or examine the papers. They also, by their evidence given at that time, conveyed the idea that Mr. Jones, the cashier, prepared the notes and mortgage. When they testified the second time, which was after the depositions of West and Jones had been taken, they both stated that the notes and mortgage were signed about the 1st of September, some six weeks previous to their date. On the second occasion they did not know who prepared the notes and mortgage, and they testified at that time that Miss Dowden and Mrs. Foxworthy both read over the papers carefully and reread several portions of them. For these and other reasons, which will be presently given, we are not impressed with the correctness of their statements.

Again, the evidence in this case shows that Mrs. Foxworthy paid nine of the coupon notes, in each of which the word "gold" was plainly stamped. Had she been the very careful, cautious business woman which her testimony taken the second time would lead one to infer she was, it would seem that, when she paid the coupons, she would have discovered the fact that they were payable in gold. There are other parts of Miss Dowden's testimony that seem somewhat peculiar. The evidence clearly shows that it was the custom, and had been for some time, for the Lombard Investment Company to make all of its loans payable in gold, and that the word "gold" was stamped before the word "dollars" in all of its notes and mortgages. It appears that Miss Dowden was soliciting agent for that company. Yet she stated that the word "gold"

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was not in the notes and mortgage, and, if it had been, it would have startled her, and would have scared her so that she would not have allowed Mrs. Foxworthy to sign them. This testimony appears to us to be very inconsistent with the position she was holding. As above stated, she was the agent of the Lombard Investment Company, and, if she was in the habit of reading its notes and mortgages at all, she must have been familiar with the fact that they were all made payable in gold. So we are unable to see why she would have been alarmed if she had seen the word "gold" before the word "dollars" in the notes and mortgage in question. Neither do we see any reason for her statement that she would not have allowed Mrs. Foxworthy to sign them if made payable in gold. In her second deposition, after it had been discovered that John West was the man who drew the notes and mortgage, she testified that she had a recollection of him as a school-boy, while it is conclusively shown by other evidence that he was a young man about 23 years of age at that time, and had been in the employment of the Lombard Investment Company in its Lincoln office for a long time prior thereto. Under such circumstances, the evidence of Miss Dowden and Mrs. Foxworthy as to the alleged alteration is far from convincing. Upon the other hand, Mr. West testified clearly, explicitly and positively that he prepared the notes and mortgage in question, and that the word "gold" was stamped into them prior to their execution. Mr. Jones, the cashier, also testified that it was his duty to examine all of the papers prior to the payment of any money upon them; that he took Mrs. Foxworthy's acknowledgment of the mortgage in question; that it was his custom, after he had examined notes and mortgages, to place thereon the letters "O. K. J.," indicating that he had examined them and found them correct. This mark appears upon the mortgage and the principal and coupon notes; and from this Mr. Jones testified that he examined the papers at the time he took the acknowledgment of the defendant, and that he knew the word "gold" appeared

therein at that time. There is also evidence of other employees that it was the custom of the Lombard Investment Company to make all of its loans payable in gold. Upon this alone it appears to us that the clear weight of the evidence is in favor of the plaintiff, and we have no hesitancy in finding that the word "gold" was stamped in the notes and mortgage prior to their execution.

There are still some other facts which should be mentioned, and which we think are conclusive of the question. An examination of one of the coupons, which appears in the record, marked "Exhibit 4," under a microscope, discloses that the last part of the words "twenty-four and no-100," immediately preceding the words "gold dollars," overlaps the word "gold" which is in red ink, thus clearly showing that those words were written after the word "gold" was stamped in the instrument. It is not conceivable that Mrs. Foxworthy signed the notes before they were filled out, and, if they were filled out prior to her execution and signature, it is clear that at least one of the coupons had the word "gold" stamped in it at the time she signed it. This being so, it may be presumed that all were so stamped.

Again, an examination of the notes and mortgage shows that the written portions thereof are underscored with red ink; and that the spaces between the written and the printed parts of the mortgage are filled with red-ink lines. The words "800 and no-100" are written in the middle of a blank line, and the first and last parts of this line are filled with red-ink marks. At first Mrs. Foxworthy testified that the red-ink lines were not in the instrument when she signed it; but afterwards modified her testimony by saying that she did not know about it.

For the foregoing reasons, together with others suggested by the evidence, we are of the unanimous opinion that the defendants failed to show by a preponderance of the evidence any alteration in the notes and mortgage in question. We therefore conclude that our former opinion is right, and the motion for a rehearing is

OVERRULED.

ELLSWORTH JOHNSON, APPELLANT, V. AMERICAN SMELTING
AND REFINING COMPANY, APPELLEE.*

FILED DECEMBER 5, 1907. No. 14,967.

1. **Pleading: AMENDMENT: CONSTRUCTION.** Original and amended petitions examined, and *held* that the amended petition did not state a different cause of action from that attempted to be set up in the original petition.
2. ———: ———: **LIMITATIONS.** A plaintiff has a right to file an amended petition setting up a good cause of action after the sustaining of a general demurrer to his original petition, notwithstanding the fact that the statute of limitations has run prior to the filing of the amended petition, provided the amended petition does not seek to recover upon a new and independent cause of action; and it is error to sustain a motion to strike such an amended petition from the files.
3. **Appeal: AMENDED PETITION: MOTION TO STRIKE: REVIEW.** When an amended petition has been stricken from the files upon the ground that it states a different cause of action from that set forth in the original petition and one that is barred by the statute of limitations, the plaintiff is entitled on appeal to review the ruling of the court in striking the amended petition from the files.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Reversed with directions.*

John M. Macfarland and Weaver & Giller, for appellant.

Crofoot & Scott, contra.

Good, C.

On the 14th day of April, 1903, the plaintiff commenced this action in the district court for Douglas county against the defendant to recover damages for a personal injury, alleged to have been sustained on the first day of July, 1899. To the petition filed by the plaintiff the defendant interposed a general demurrer. On the 21st day of March, 1904, an amended petition was filed, and on the day fol-

* Rehearing allowed. See opinion, p. 255, *post*.

lowing the district court sustained the demurrer to the original petition, and granted leave to file an amended petition instantner. While it does not appear that the plaintiff consented to the sustaining of the demurrer, that inference may be drawn from the fact that he filed an amended petition on the day previous to the ruling of the court on the demurrer. Thereafter the defendant filed the following motion: "Comes now the defendant, and moves the court to strike from the files the amended petition in this cause filed, for the reason that the amended petition sets forth a new and different cause of action from that set forth in the original petition, and one that was barred by the statute of limitations at the time of the filing of said amended petition." This motion was sustained on the 21st day of November, 1904. On the 4th day of February, 1905, plaintiff filed a second amended petition, practically identical in form with the original petition, which petition was, on motion of the defendant, stricken from the files, upon the ground that it was not an amended petition, but a copy of the original petition, to which a demurrer had been theretofore sustained by the court. Thereupon the plaintiff filed a motion, requesting leave of court to withdraw his consent to the sustaining of the demurrer to his original petition, which leave was granted by the court. Under the date of April 28, 1906, appears the following journal entry: "And now on this day come the parties hereto by their attorneys, and this cause comes on to be heard upon a demurrer of the defendant to the original petition of the plaintiff herein, and is argued and submitted to the court; and, after due consideration and being fully advised in the premises, the court does sustain said demurrer, to which the defendant duly excepts, and is by the court granted ten days to amend his original petition." The plaintiff refused to plead further, and upon motion judgment of dismissal was entered. Plaintiff appeals, and assigns as error the order of the court in sustaining the motion to strike his first amended petition, the order of the court in sustaining the motion to

strike his second amended petition, the order of the court in sustaining the demurrer to the original petition, and the order of the court in rendering judgment of dismissal.

The first question for determination is as to whether or not the court erred in sustaining the motion to strike the first amended petition. In order to determine this question, it becomes necessary to examine both the original and the first amended petitions. In the original petition the plaintiff alleged the corporate capacity of the defendant; that it was engaged in operating a smelter in Omaha; that it had succeeded "to the rights, property and liabilities of the Omaha & Grant Smelting Company"; that the defendant is now the owner of said smelting property, and running a smelter; that on or about the first day of July, 1899, "the predecessor of the defendant herein owned and operated" the said smelter. Then plaintiff averred that "he was employed by the predecessor of the defendant, and was working for them as a common laborer on or about the 1st day of July, 1899, and that he was under the direction and control of John T. Wolfe, a foreman of said party, and a foreman of the defendant herein"; that while he was so employed for the predecessor of said defendant under said foreman, on or about the 1st day of July, 1899, "he was instructed by Wolfe to take out a broken jacket, and put on a new jacket, from a hot furnace," etc. Then follow the allegations of his injury and the extent thereof, closing with the following: "That said injury was the result of the carelessness of the defendant and their foreman, and was without any negligence on the part of the plaintiff." In the first amended petition it is charged that the defendant at the time of the injury owned and operated the smelter, and that the plaintiff was in its employment, and acts of primary negligence were charged to the defendant, which caused the injury complained of. There is no question raised as to the first amended petition stating a cause of action against the defendant. Appellee contends that the amended petition sets forth a different cause of action from the original

petition, and that the statute of limitations had run prior to the filing of the amended petition, and that it was therefore proper to strike the amended petition from the files. We do not concur in this view. The cause of action for which plaintiff sought a recovery was for the injury sustained by him while replacing a broken jacket upon a hot furnace on the 1st day of July, 1899, and that through the negligence of the foreman, Wolfe, he was injured and sustained damages. The same injury, happening at the same time, in the same place, and under the same circumstances, is the basis of his action in each instance. It was not a new cause of action that he set up in the amended petition. It is doubtless true that the cause of action was defectively pleaded in the original petition. The principal defect therein was that it failed to show that the defendant was responsible for the employment of the plaintiff, or that it was responsible for the action of the foreman, Wolfe. The petition was defective, in that it failed to connect the defendant with the negligence, which, it was alleged, produced the injury.

The rule is well settled that an amendment should not be permitted for the purpose of setting up a new cause of action; but this does not forbid the amplification of the original cause of action. Nor does it prevent an amendment whereby a cause of action would be stated, when none was stated in the first instance, if it appears that it is the same cause of action that was attempted to be set up in the first instance. The court will be liberal in allowing amendments when the cause of action is not totally different. Bliss, *Code Pleading* (2d ed.), sec. 429. "Where a proposed amendment consists of new matter relating to the subject of the action as set forth in the complaint, and is not a new and independent cause of action, the fact that the statute of limitations has attached to it pending the suit is a strong reason for allowing the amendment instead of refusing it." 1 *Ency. Pl. & Pr.* 518, and authorities there cited. "The courts are not entirely agreed as to the right of the plaintiff to substitute a differ-

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ent form of action from that set forth in the petition. But the better rule seems to be that, so long as the subject of the action remains substantially the same, an amendment may be permitted." Maxwell, Code Pleading, 578, 579. In the case of *Norfolk Beet-Sugar Co. v. Hight*, 59 Neb. 100, it is held: "A petition in which the cause of action is insufficiently or defectively stated may be amended by adding other allegations to remedy or cure the defects. The statute of limitations does not run against the amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action." In the case of *Kuhns v. Wisconsin, I. & N. R. Co.*, 76 Ia. 67, it was held proper to permit an amendment after the bar of the statute, setting forth additional and other grounds of negligence than those stated in the original petition; that, as long as it was the same injury for which recovery was sought, the identity of the cause was maintained, although different grounds were alleged as the producing cause of the injury. In *McKeighan v. Hopkins*, 19 Neb. 33, it was held proper to permit a petition to be amended so as to change the form of the action from one in ejectment to a petition to redeem, upon the ground that the object in both cases was to recover the land, and that the identity of the cause of action was maintained, though there was a change of form. And in that case it was held that the statute of limitations did not run, though the statutory period had elapsed prior to the amendment. The same doctrine is substantially set forth in *Merrill v. Wright*, 54 Neb. 517. We therefore conclude that the district court erred in striking the amended petition from the files.

Appellee contends that the order of the trial court in permitting plaintiff to withdraw his consent to the sustaining of the demurrer to the original petition did not have the effect of setting aside the order sustaining the demurrer, and that, as plaintiff took no exception to the ruling of the court in sustaining the demurrer, he has no standing in this court. If such were the rule, then, in

any case where plaintiff's petition was defective, and a demurrer thereto was properly sustained, and he should file an amended petition stating a good cause of action, which should be stricken from the files, even though erroneously, the plaintiff would be without a remedy. The object of pleadings is to arrange for the orderly trial and disposition of a case upon its merits, and amendments of pleadings are always allowed in the furtherance of justice. To our minds the rule contended for by the appellee would amount to a bit of legal jugglery, whereby the plaintiff would be deprived of a hearing upon the merits of his cause. *Wheeler v. Barker*, 51 Neb. 846, is a case somewhat similar to the case at bar. It was there held that, where the amended petition had been stricken from the files, after the sustaining of a demurrer to the original petition, plaintiff might, by proceedings in error, review the order of the trial court in striking the amended petition from the files. And it was further held that, if upon examination the amended petition was not substantially the same as the original petition, it was error to strike it from the files.

We think it therefore follows that the trial court erred in striking from the files the amended petition and in rendering judgment of dismissal, and that the judgment should be reversed and the cause remanded, with instructions to restore to the files the first amended petition.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with instructions to restore to the files the first amended petition.

REVERSED.

The following opinion on rehearing was filed May 7, 1908. *Former opinion vacated and judgment of district court affirmed.*

Johnson v. American Smelting & Refining Co.

1. **Pleading: CAUSE OF ACTION.** All facts which, taken together, are necessary to fix the responsibility for an injury complained of constitute a cause of action.
2. ———: **AMENDED PETITION: NEW CAUSE OF ACTION.** A cause of action alleged in an amended petition, although founded upon the same injury as that described in the original, is a different cause of action, if it is dependent entirely upon different reasons for holding the defendant responsible for the wrong alleged.
3. ———: ———: ———. The original petition alleged a personal injury and consequent damages to plaintiff because of the negligence of a third party, and that defendant succeeded to the liabilities of such third person; the amended petition alleged that said injury was caused by defendant's negligence. *Held*, That the amended petition stated a new and different cause of action.
4. ———: **CONCLUSIONS OF LAW.** In testing the sufficiency of a pleading, mere conclusions of law will be disregarded.
5. **Judgment Vacated.** Our opinion herein, *ante*, p. 250, vacated.

EPPERSON, C.

After the opinion reported *ante*, p. 250, was filed herein, a rehearing was allowed. A history of the case may be found in the former opinion. In the original petition plaintiff pleaded an injury received by him through the negligence of a third party, the Omaha & Grant Smelting Company. He sought to charge defendant therewith by alleging that defendant succeeded to the rights, properties and liabilities of such third party. Following this allegation the plaintiff specifically set forth the nature of the negligent acts complained of on the part of the Omaha & Grant Smelting Company and on the part of their foreman, Wolfe. He alleges that said Wolfe is also the foreman of the defendant herein, but definitely sets forth that it was while the plaintiff was employed by defendant's predecessor that he received the injury complained of. After making these specific allegations, the plaintiff alleged "that said injury," meaning necessarily the injury inflicted through the carelessness of the Omaha & Grant Smelting Company, "was the result of the carelessness and negligence of defendant and their foreman." A de-

murrer was sustained to this petition, to which the plaintiff apparently consented. Whereupon he presented the amended petition, in which he alleged that the same injury was caused by the negligence of the defendant and its foreman. The question arises whether the amended petition, which was stricken from the files, stated a new and different cause of action, or was it a proper substitute for the original petition. The plaintiff attaches significance to the phrase appearing in the original petition, "that said injury was the result of the carelessness and negligence of the defendant and their foreman," claiming that it charges defendant with negligence, and which would permit of an amendment more specifically alleging such cause. It is true that a general averment that the defendant was negligent, without setting forth the negligent acts or omissions, is good as against demurrer. But was the allegation referred to a general allegation of negligence on the part of the defendant? A pleading must be taken in its entirety to ascertain the cause of action or defense relied on by the pleader, and, as the original petition specifically set forth the negligence of a third party as the cause of his injury, the phrase now relied on by the plaintiff may not be given the weight of a general allegation of negligence. The phrase is contradictory. "Said injury" means the injury previously described in the petition. That was the injury inflicted by the Omaha & Grant Smelting Company. It could not have been caused by the negligence of the defendant. The allegation was but an illogical inference of the pleader.

If recovery may be had under the original petition, it is because defendant succeeded to all the liabilities of the Omaha & Grant Smelting Company. More than four years after the alleged injury, the plaintiff filed his amended petition, charging the defendant with negligence. He set forth the same injury as that alleged in the original petition, except that he now alleges that it was inflicted by defendant instead of its predecessor. If this is

a new and different cause of action it is barred by the statute of limitations. In our former opinion we considered that the amended petition was a mere amplification of the original cause of action. We there said: "The cause of action for which plaintiff sought a recovery was for the injury sustained by him while replacing a broken jacket upon a hot furnace on the 1st day of July, 1899, and that through the negligence of the foreman, Wolfe, he was injured and sustained damages. The same injury, happening at the same time, in the same place, and under the same circumstances, is the basis of his action in each instance. It was not a new cause of action that he set up in the amended petition." Further consideration has convinced us that we were in error in holding that it was not a new cause of action that he set up in his amended petition. It is the same injury, but a different liability is alleged against the defendant. It now appears that the failure to observe the distinction resulted in the erroneous conclusion reached at the former hearing. The injury, it is true, is the subject of the action. Had no injury been suffered, there would have been no cause of action. The cause of action in any case embraces, not only the injury which the complaining party has received, but it includes more. All the facts which, taken together, are necessary to fix the responsibility are parts of the cause of action.

In *Buerstetta v. Tecumseh Nat. Bank*, 57 Neb. 504, it appears that the original petition filed therein alleged that the plaintiff had deposited with the third party, a bank, certain money represented by certificates of deposit, which remained unpaid. She sought to hold defendant by alleging that it succeeded to the business of the third party, and its liability to plaintiff. Later plaintiff filed an amended petition containing additional allegations charging defendant with fraud. It was held that the additional facts pleaded in the amended petition constituted a separate and distinct cause of action independent from that stated in the original petition, and that the statute of limitations against the cause of action pleaded in the

amendment ran until the filing of such amended petition. See, also, cases reviewed in that opinion. In *Box v. Chicago, R. I. & P. R. Co.*, 107 Ia. 660, it was held: "In an action to recover damages for negligence, 'the cause of action,' as used in pleading, is not the injury wrongfully inflicted through defendant's negligence, but is the fact or facts that justify the action, or show the right to maintain it." The original petition in that case charged defendant with negligence in using different systems of bumpers in the coupling of its cars. The amended petition, which was held by the court to have been improperly allowed, charged negligence to the defendant, in that the injury was caused by its having bumpers loose and out of repair. The conclusion of the court was that the amendment charged a different cause of action. It changed the nature of the action pleaded in the original petition, and should not have been allowed. In the opinion we find the following: "The cause of action is the fact or the facts that 'justify it, or show the right to maintain it.' Hence, when a material fact, necessary to a recovery, is omitted from a petition, we say it does not state a cause of action." In the opinion the court quoted from *Rodgers v. Mutual E. A. Ass'n*, 17 S. Car. 406, as follows: "What is a cause of action? We must keep in view the difference between the subject of action and the cause of action. The subject of action is what was formerly understood as the subject matter of the action. * * * The cause of action is the right claimed or wrong suffered by the plaintiff, on the one hand, and the duty or delict of the defendant, on the other, and these appear by the facts of each separate case." In *Union P. R. Co. v. Wyler*, 158 U. S. 285, it was held that the amended petition, alleging that the plaintiff's fellow servant was negligent and caused the injury, was a departure from the original allegation of the negligence on the part of the defendant in the employment of an incompetent person who caused the injury. In *Van Patten v. Waugh*, 122 Ia. 302, 98 N. W. 119, it was held that an amendment, alleging that the claimant was surety upon

certain notes, which he originally declared upon as owner, and which by reason of his liability as surety he was required to pay, was a different cause of action, and could not be sustained. In the opinion in that case the court recognizes the rule that, where the gist of the action remains the same, the court has the right to permit the plaintiff to withdraw his original declaration and file an amended one. The court, speaking through Ladd, J., say: "The mere fact of indebtedness does not indicate the cause of action out of which it arises. Otherwise an amendment alleging tort might be said not to add a new cause in an action on contract. As long as the pleader adheres to the contract or injury originally declared on, he may change the form or amplify his allegations; but he cannot inject by amendment an entirely new cause of action, and by so doing avoid the bar of the statute of limitations, which has run against it." In *Phoenix Lumber Co. v. Houston Water Co.*, 59 S. W. (Tex. Civ. App.) 552, it is held: "A petition alleged an express contract between plaintiff and a water company of which defendant was the successor to protect plaintiff's premises from fire, a breach of such contract, and loss by reason of defendant's failure to furnish sufficient water pressure as agreed, by reason of which the fire loss occurred. After the expiration of limitations an amendment was filed, which abandoned all reference to the contract, and alleged the facts as tending to impose on defendant a duty by implication of law to exercise ordinary care to supply water to the premises available for fire protection, and alleged that by reason of defendant's negligent failure to supply water plaintiff was damaged, etc. Held, That, plaintiff's cause of action alleged in the petition and amendment being essentially different, the former alleging an obligation *ex contractu* and the latter a cause of action *ex delicto*, and no fact of negligence except that arising from defendant's breach of contract being relied on to support the same, the amendment was improper, and the action was barred." In *Woodward v. Northern P. R. Co.*, 111 N. W. (N. Dak.)

627, plaintiff alleged in his first petition that he was the owner of certain premises destroyed by fire through defendant's negligence. He attempted to amend by alleging that he was the assignee of the owner of premises destroyed, or, in other words, that he was the assignee of the chose in action. The court denied him the right to thus amend, for the reason that he attempts to set up a cause of action entirely distinct from that originally pleaded. In *Gilleland & Dillingham v. Louisville & N. R. Co.*, 119 Ga. 789, 47 S. E. 336, it was held: "A declaration sounding in tort, seeking to recover from the defendant as a common carrier for the breach of its duty to furnish a suitable car for the transportation of live stock, cannot be amended by setting up as the basis of recovery a special contract between the parties for the equipment of the car." In line with the decisions above quoted or referred to at some length are the following decisions: *Boston & M. R. Co. v. Hurd*, 108 Fed. 116; *Phelps v. Illinois C. R. Co.*, 94 Ill. 548; *Blake v. Minkner*, 136 Ind. 418; *Parsons Water Co. v. Hill*, 46 Kan. 145; *Meeks v. Southern P. R. Co.*, 61 Cal. 149; *Campbell v. Campbell*, 133 Cal. 33.

The rule controlling the amendment of pleadings is liberal, but from the great weight of authority and the better reasoning it will not be expanded to such an extent as to permit the bringing in of a new or independent cause of action. A cause of action alleged in an amended petition, although founded upon the same injury as that described in the original, is a different cause of action, if it is dependent entirely upon different reasons for holding the defendant responsible for the wrong alleged. In *Kuhns v. Wisconsin, I. & N. R. Co.*, 76 Ia. 67, cited in our original opinion, an amendment was permitted after the bar of the statute, but such amendment was, as it appears in the opinion of the court, "nothing more than a more specific statement of the averment in the original petition." It appears therein that the amendment did not attempt to allege a reason for the defendant's liability to

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the plaintiff, other than the reasons set forth in the original pleadings. It did not attempt to change the nature of the defendant's liability or to allege a different liability than that originally pleaded. In both the amended and original petitions primary negligence on the part of the defendant was charged. In *Norfolk Beet-Sugar Co. v. Hight*, 59 Neb. 100, the amendment permitted was a mere amplification of the original statement. "It charges no additional wrongful act, but merely states another fact to sustain the charge already made." In *McKeighan v. Hopkins*, 19 Neb. 33, the identity of the cause of action was preserved in the amendment allowed, although the prayer for relief was changed from one in ejectment to one to redeem. *Merrill v. Wright*, 54 Neb. 517, was an action wherein the plaintiff sought the foreclosure of tax liens upon property purchased at sales for taxes. The petition was defective, in that it failed to allege the levy and assessment of such taxes. By the amended petition plaintiff supplied these defects. The amendment pertained to the original cause of action, which was defectively stated in the original. There was no attempt to change the nature of the action, nor to allege a different liability than that defectively set forth in the original petition. Without further review of the authorities cited in our former opinion, it will be noticed that each of them is distinguishable from the case at bar, in that here the amended petition changed the nature of the action, in that it sought to recover because of an alleged liability of a different nature.

The sustaining of the demurrer to the original petition is assigned as error. After the second amended petition was stricken from the files, the plaintiff withdrew his consent to the first order of the court sustaining a demurrer to the original petition, so that the case came for hearing again in the lower court upon that demurrer. As above stated, the allegation charging the defendant with liability is that it has succeeded to all the rights, properties and liabilities of the Omaha & Grant Smelting Company, which inflicted the injury complained of in the petition

now under consideration. This allegation also is but a conclusion of law. It is not alleged that the defendant entered into any contract whereby it assumed the liabilities of its predecessor, nor are any facts set out from which it could be inferred that the defendant had become subject to the liability alleged by the plaintiff. As a matter of law, a corporation which succeeds to the business of another is not liable in damages for the torts of the latter. That defendant "succeeded to the liabilities of the Omaha & Grant Smelting Company" is insufficient to hold it responsible to plaintiff. As argued by defendant: "Plaintiff might just as well have limited his petition to the simple allegation that the defendant was indebted to the plaintiff in the sum of \$2,000, as to set forth certain acts of negligence on the part of the third party, and then merely allege the conclusion that the defendant had succeeded to the obligation thus incurred by such third party." In testing the sufficiency of a pleading, mere conclusions of law will be disregarded. *Woodward v. State*, 58 Neb. 598.

It follows that the court committed no error in striking the second amended petition, which was substantially the same as the original; nor in dismissing the case.

We recommend that our former opinion be vacated, and the judgment of the lower court affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the former opinion is vacated, and the judgment of the lower court affirmed.

JUDGMENT ACCORDINGLY.

PATRICK E. MCKILLIP, APPELLANT, v. R. N. HARVEY,
APPELLEE.

FILED DECEMBER 5, 1907. , No. 14,994.

1. **Appearance: SPECIAL AND GENERAL.** A defendant may appear specially to object to the jurisdiction of the court, but if, by motion or other form of application to the court, he seeks to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally. *Cropsey v. Wiggerhorn*, 8 Neb. 108.
2. ———: ———. In an action at law against a nonresident defendant, if service is made upon the defendant in any manner not authorized by law, defendant may appear specially and move to quash the service, but, if he go further and pray for a dismissal of the case, it will be held to be a general appearance in the action, as it invokes the power of the court on a question other than that relating to jurisdiction. *Bucklin v. Strickler*, 32 Neb. 602.

APPEAL from the district court for Boone county:
JAMES N. PAUL, JUDGE. *Reversed.*

H. C. Vail, for appellant.

H. Halderson, *contra.*

FAWOETT, C.

This case is before us on an appeal from a judgment of the district court for Boone county dismissing plaintiff's action, for the reason, as stated in the judgment of the court, "that it appears on the face of the pleadings filed herein by the plaintiff that, under the law, he has no cause of action." Plaintiff filed his petition, declaring upon a promissory note, the petition being in the usual form, and making all of the necessary allegations to entitle him to recover. An examination of the transcript, *dehors* the petition, discloses the fact that defendant was a nonresident of the state of Nebraska. Plaintiff filed his affidavit, and sued out a writ of attachment and procured the issuance of a writ of garnishment, making serv-

ice by publication. Answers were made by the garnishees. Subsequently thereto plaintiff, by leave of court, filed a supplemental petition, asking for equitable relief, on the theory that he had exhausted his legal remedy under his original petition. To this petition defendant filed a special appearance, and moved the court to quash the service of summons, for the reasons: First, that the time intervening between the filing of the petition and the affidavit for publication was so great as to raise a presumption that a change in the facts of the case had occurred during the interim; second, because the affidavit for service by publication did not state that the case was one of those mentioned in section 77 of the code, and did not state facts showing that any of the grounds for service by publication provided in said section existed; third, because the answers of the garnishees in the action then on file showed that the defendant had no property in this state at the time of the commencement of the action; and, fourth, because the notice of publication erroneously stated that two of the garnishees had answered that they had property of the defendant, while the answers of the said garnishees on file showed the contrary to be the fact. As said by SULLIVAN, J., in *Bankers Life Ins. Co. v. Robbins*, 59 Neb. 170: "The effort of the company evidently was to try the matter and obtain a judgment on the merits while standing just outside the threshold of the court. This it could not do. A party cannot be permitted to occupy so ambiguous a position. He cannot deny the authority of the court to take cognizance of an action or proceedings, and, at the same time, seek a judgment in his favor on the ground that his adversary's allegations are false or that his proofs are insufficient."

The court sustained the second reason above assigned and overruled the other three; gave plaintiff leave to file a new affidavit for service by publication, and continued the cause for service. Plaintiff thereupon filed a new affidavit and gave new notice. Defendant then appeared and filed a demurrer to that petition upon three grounds:

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"First, this court has no jurisdiction of the person of the defendant; second, because two causes of action are improperly joined; third, because it does not state facts sufficient to constitute a cause of action." By agreement of the parties in open court, this demurrer was submitted to the court upon briefs filed by the respective parties. After the submission of the case upon demurrer, and without a ruling thereon, plaintiff asked and obtained leave of the court to withdraw his supplemental petition. Defendant then filed this motion: "Comes now the defendant in the above entitled cause of action, and moves the court to dismiss the same for the following reason: That it appears upon the face of the pleadings filed by the plaintiff herein that the defendant is a nonresident of the state of Nebraska, and that at the time of the commencement of this action he had no property or debts owing him in the state of Nebraska." Upon that motion the court entered this judgment: "This cause came on to be heard on the motion of the defendant herein filed to dismiss this action, for the reason that it appears on the face of the pleadings filed herein by the plaintiff that, under the law, he has no cause of action, which motion was argued and submitted to the court, and the court, on consideration thereof, being fully advised, sustains the said motion to dismiss, the plaintiff excepting." In this we think the district court erred. The motion filed by defendant was clearly a general appearance. The rule is well settled in this state that "a defendant may appear specially to object to the jurisdiction of the court, but if, by motion or other form of application to the court, he seeks to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally." *Cropsey v. Wiggenshorn*, 3 Neb. 108, cited and adhered to in many later decisions by this court. In *Bucklin v. Strickler*, 32 Neb. 602, defendant's motion was "to dismiss this case for want of proper service." In the opinion the court say: "The motion is too broad. It is to dismiss the action. The most that could be done in any case, where the only objection is

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that the service is defective, is to quash the summons. In such case the appearance must be limited to that purpose, otherwise it is general."

The only petition in the case at the time defendant's motion was filed was the original petition filed by plaintiff, declaring on his promissory note. This stated a good cause of action; hence, it was error on the part of the court to dismiss the action. The supplemental petition had been withdrawn, and could not be looked to in considering defendant's motion. But, even if it were to be considered, we would still be compelled to hold that defendant, both by his "special appearance" and by his general demurrer, appeared generally. *Bankers Life Ins. Co. v. Robbins, supra*, and *Gilbert v. Hall*, 115 Ind. 549, cited therein with approval. From either point of view, the court erred in dismissing the action.

We therefore recommend that the judgment of the district court be reversed, and plaintiff's action reinstated, and that the cause be remanded for further proceedings.

AMES and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and plaintiff's action reinstated, and the cause remanded for further proceedings.

REVERSED.

SIMON KENNEDY, APPELLEE, V. CHICAGO, BURLINGTON &
QUINCY RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 5, 1907. No. 14,806.

1. **Railroads: NEGLIGENCE: EVIDENCE.** The mere killing of an animal by collision with a moving train upon the tracks of a railway company is not evidence of negligence, nor can negligence be established by inference and conjecture in contradiction to the testimony of a competent, unimpeached and disinterested eyewitness.

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2. Evidence examined, and held insufficient to support a verdict. LERTON, J., dissents to this proposition.

APPEAL from the district court for Saunders county:
ARTHUR J. EVANS, JUDGE. *Reversed.*

Roscoe Pound, J. W. Deweese and F. E. Bishop, for appellant.

John Barry, contra.

AMES, C.

This is an action to recover damages for the alleged negligent killing of the plaintiff's cow upon the tracks of the defendant company. The plaintiff recovered, and the defendant appealed.

There is no important conflict in the evidence, but it is urged that conflicting inferences of fact are deducible therefrom, and that in such cases such inferences are to be drawn and the preponderance of them determined by the jury, and not by the court. The occurrence happened within the defendant's depot grounds or yards, which were not fenced nor required so to be by law. There were five or six cows of the plaintiff on the grounds at the time, all of which, it appears, had gone there a short time previously. The locomotive engineer is the only witness who testified to having seen the accident, or the animal, immediately before the former happened. He saw only that cow and one other, which, he says, were standing near each other on the defendant's right of way, and about 20 or 30 feet from the track, and that, when the train was about 150 feet away and moving at a speed of about 20 miles an hour, the animal that was killed suddenly left her companion, and bolted upon the track immediately in front of the engine. It is not claimed that the rate of speed was in itself excessive or needlessly dangerous, and the engineer testified to having kept an ordinary lookout along the track in front of him, and to have seen no other animals, and that he had no reason to anticipate the strange and

unprecedented conduct of the cow, and did not become aware of it until the instant of the collision. For that reason, he did not sound an alarm whistle, or make a sudden or what is called an emergency stoppage of the train or slacken its speed. Within what distance such a stop could have been made the record does not disclose, but it was testified that a "service" stop could have been effected in 300 feet. The cow was unquestionably a trespasser, and the rule of law is well settled and undoubted that, for the killing of or injury to an animal under such circumstances, a railway company is not liable, unless the casualty is due to the gross or wanton negligence of its servants or employees in omitting such precautions as a reasonably capable and prudent man would employ to avert danger or prevent an obviously impending catastrophe. *Young v. Hannibal & St. J. R. Co.*, 79 Mo. 336; *Burlington & M. R. R. Co. v. Wendt*, 12 Neb. 76.

The gist of the action is negligence, which is not to be presumed, but must be proved, and, in this case, of negligence in an unforeseen and not to have been anticipated emergency. We think it quite clear that, if the story of the engineer is true, the obligation of the plaintiff with respect to the burden of proof has not been met, and that the evidence is insufficient to support the verdict. That story is not directly contradicted, but the plaintiff produced witnesses who saw five or six of his cows go upon the defendant's right of way and into the yards, and who testified that after the accident happened they had followed and traced the tracks of the animals from the place of their entry to that of the killing, and that the tracks showed that the animals, or some of them, had walked that distance upon the defendant's roadbed, and from this fact, and the further fact that the accident happened, as they ascertained by "stepping," some 400 feet nearer the place of entry than the engineer guessed that it did, counsel infer and argue that the jury were justified in inferring that the engineer testified falsely, or at least mistakenly, in saying that the animal killed was one of those that he

saw standing beside the track, and contend that it was one walking on the roadbed, toward the train from the point of entry, which they say was 600 feet, and the engineer guessed was "about" 1,000 feet, from the place of the collision; and from this inference they deduce the further inference that, if the engineer had kept a reasonably careful or vigilant outlook along the railway track ahead of his train, he would have seen the cow in time to have stopped his engine, or to have frightened her away, and so have averted the casualty. It seems to us that such a building of inference upon inference is too unsubstantial a structure for the support of a verdict, especially when the inferences are contradicted by the direct testimony of a competent and unimpeached and, so far as appears, disinterested eye-witness. To hold otherwise would, it appears to us, quite overthrow the rule announced by this court in *Burlington & M. R. R. Co. v. Wendt*, *supra*, that the mere killing of the animal is not evidence of negligence, and to permit a recovery to be had upon a theoretical conjecture, the product rather of imagination than of fact.

We therefore recommend that the judgment of the district court be reversed and a new trial granted.

JACKSON and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and a new trial granted.

REVERSED.

LETTON, J., concurring in the conclusion.

I do not take the view as to the evidence which is announced in the foregoing opinion. I think the question is properly for the jury, and that, if the jury believed the plaintiff's witnesses, and had been properly instructed as to the law, there was sufficient evidence to support the verdict. It is admitted the cow was trespassing upon the railroad track at a point where it was not the duty of the

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railroad company to fence its tracks. In such a state of facts, the railroad company is only liable in case the killing is caused wantonly or by gross negligence on the part of its employees. *Burlington & M. R. R. Co. v. Wendt, supra*. The jury were told that the question to determine was whether the employees of the railroad company were guilty of negligence in the operation of the train. This instruction was complained of and is erroneous. Unless, under all the circumstances, the engineer was guilty of gross negligence, the plaintiff cannot recover. If the jury believed the engineer, no liability existed; if they believed the plaintiff's witnesses, the question for the jury was whether it was gross or wanton negligence on the part of the engineer, under all the circumstances, not to see the cattle on the track a sufficient time before reaching them so as to avoid the killing by the exercise of ordinary care. I therefore concur in the conclusion, but not in the opinion of Mr. Commissioner AMES.

HENRY J. ABRAHAMS, APPELLEE, V. CITY OF OMAHA,
APPELLANT.

FILED DECEMBER 5, 1907. No. 15,004.

1. **Cities: WARRANTS: VALIDITY.** A warrant issued by a city in consideration of a demand which is a valid obligation payable out of its general funds is not invalidated by a recital, not contemplated by the statute, that it shall be payable out of a special fund which the city is not authorized to create, or out of a special fund which the city may lawfully create, but the failure to create which is due solely to the fault or negligence of the city.
2. **Limitation of Actions: ACKNOWLEDGMENT OF DEBT.** A warrant issued by the proper authorities of a city in consideration of a valid indebtedness against it is a written acknowledgment of such indebtedness and promise to pay it, and arrests the running of the statute of limitations.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Affirmed.*

Harry E. Burnam, I. J. Dunn and John A. Rine, for appellant.

George W. Shields, contra.

AMES, C.

This is an appeal from a judgment against the city of Omaha. The facts are the same as, or precisely similar to, those considered in the two former decisions of this court in the two cases of *Rogers v. City of Omaha*, 75 Neb. 318, 76 Neb. 187. We have not been advised by counsel and do not understand that any principle is invoked that was not involved in and expressly or by necessary implication determined by these two decisions, which are not assailed as erroneous or asked to be in any respect overruled or modified. Under such circumstances, a statement of the facts in detail or an elaboration of the principles of law applicable to them does not seem to us to be called for.

The plaintiff is the assignee for value and the owner of three claims against the city. One of them accrued to Mrs. Sarah J. Haskell for the value of real property taken from her by the city in the exercise of the power of eminent domain under precisely the same circumstances, so far as we can see, as those in which the property of Mrs. Croft was taken in the case first cited. Warrants were issued in satisfaction in the same form, and payment thereof was delayed and finally refused for the same reasons and for about the same length of time in one case as in the other, and in both cases the negligence, ineptitude or irregularity of the city, not of the plaintiff, is relied upon as having set the statute of limitations in motion, and to have operated to bar a short time before the action was begun. Another of these claims is for the contract price of sewers constructed in like circumstances as those in which the work of street grading was done by the plaintiff's assignor in the second of the cases above cited, in satisfaction of which warrants were issued in like form as in that case, and payment in like manner delayed and finally refused,

because of irregularities committed by the city authorities, in consequence of which their attempt to create a special fund for the purpose was unavailing. The third claim is for the contract price of making certain water service connections, for which the charter provides that the city may reimburse itself by withholding an equal amount accruing from it to the water company on account of water furnished for city uses. The city undertook to provide payment for this service by creating a special fund by special taxation upon adjacent property, which it is contended that it is without lawful authority to do, and the warrants recited that they should be payable out of such fund. The recital, we think, was, if the contention is sound, mere surplusage, not affecting the validity of the instrument as general obligations of the city. The work on this contract was completed on October 7, 1893, but the matter was not finally adjusted and the warrants issued until the 15th of December following. This action was begun November 23, 1898, so that the five years' interval began between the time of the completion of the work and the issuance of the warrant. We think the warrants executed and delivered by the competent city authority are a written acknowledgment of the claim and a promise to pay it which is obligatory upon the city and arrested the running of the statute of limitations, if the running of the latter had previously begun, which we do not decide. There is a similar series of dates respecting the other two claims. All the issuable facts and circumstances are set forth in the pleadings and established by the evidence, and it appears to us to be immaterial, so far as the statute of limitations is concerned, whether the action is regarded as founded upon the warrants or upon the contract in satisfaction of which they were given. In either view the statute is not available as a defense. In all these instances, however, the warrants were issued in consideration of demands which were valid obligations of the city, payable out of its general funds, and, in our opinion, the instruments were not

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invalidated by a recital, not contemplated by statute, that they should be payable out of special funds, which in one instance the city was not authorized to create, and which in the other two instances there was a failure to create, due solely to the fault or negligence of the city.

We recommend, therefore, that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WILLIAM HART, APPELLEE, v. CHARLES M. MURDOCK ET AL.,
APPELLANTS.

FILED DECEMBER 5, 1907. No. 14,893.

1. **Appeal: PRACTICE: BRIEFS.** Errors assigned by appellee in his printed brief filed after the date required by rule 35 will be considered when the appellant neither objects to the service and filing thereof, nor moves to strike it from the record as having been filed out of time.
2. **Tax Certificate: FORECLOSURE: DESCRIPTION.** Where, in a suit to foreclose a tax sale certificate, a clerical mistake appears to have been made in the description, such error will not defeat the action if sufficient remains in the description to identify the land upon the tax list.
3. **Taxation: VOID ASSESSMENT.** Where land owned by one person is assessed with land of another, so that neither owner can determine the amount for which his property is liable, the entire tax is void.
4. ———: **DESCRIPTION.** In a description of land by metes and bounds, a point of the compass named in a survey may be construed to mean a different or opposite direction, when it appears to have been written by clerical error, and is so inconsistent with the remaining parts of the description as to demonstrate that the different or opposite direction was intended.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed in part.*

E. O. Kretsinger, for appellants.

R. W. Sabin, contra.

CALKINS, C.

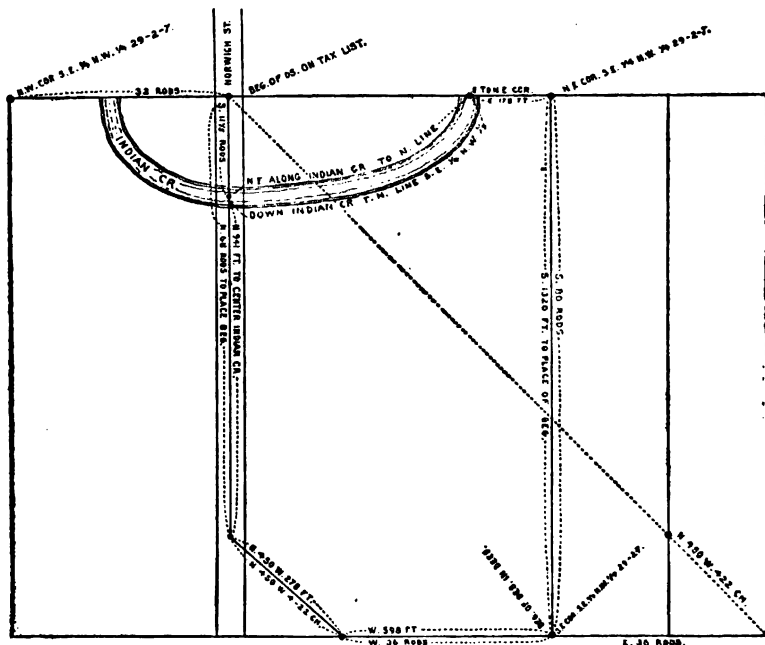
In 1892 the defendants became owners of 21 acres of land situated in the southeast quarter of the northwest quarter of section 29, town 2, range 7, in Gage county. In the deed by which the defendants took title, the land was described by metes and bounds as follows: "Commencing at the southeast corner of the southeast quarter of the northwest quarter of section 29, in township 2 north, of range 7 east of the 6th P. M., thence west along the south line of said tract of land 598 feet, thence north 45° west 287 feet, thence north 941 feet to the center of Indian creek, thence down the center of the channel of Indian creek in a northeasterly direction to a point where the north line of the southeast quarter of the northwest quarter of said section 29 crosses said Indian creek, thence east along said north line 175 feet, more or less, to the northeast corner of the above described forty-acre tract of land, thence south along the east line of said land 1,320 feet to the place of beginning, containing 21 acres, more or less." The description of this land on the tax list for the years 1896 and 1897 was: "Com. 32 rds. e. of N W cor S E⁴ N W⁴, th E to pt on a line with the center of Norwich St. th S 11 1-5 Rds. to Indian creek, th N E along creek to N line S E⁴ N W⁴, th E to N E cor. S E⁴ N W⁴ th S 80 Rds., th W 36 Rds., th N 45° W⁴ 22.100 Chs., th N 68 Rds. to the place of beginning in S E⁴ N W⁴ 29-2-7."

The accompanying diagram illustrates the two descriptions, the first being indicated on the interior, and the second on the exterior lines of the tract.

It will be observed that in the tax list description the distance from the northwest corner of the southeast quarter of the northwest quarter to the center of Norwich street is not given; but it appears from a plat introduced

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in evidence by the defendant that the center of Norwich street is 32 rods east of the northwest corner of the south-east quarter of the northwest quarter, so that the starting point of this description is in the center of Norwich street, and, since the second call ends there, it may be ignored. With this explanation, the two descriptions, though starting from different points, describe the same land, the courses being the same, and the distances, when reduced to feet, corresponding, except in the last call of the tax



list description, which does not stop on Indian creek, but runs to the place of beginning, which is 11 1-5 rods further north. When allowance for this additional distance is made, the two courses are of practically the same length. In the tax list for 1898 the description was the same, except that the word east was substituted for the word west in the course next after the run of 80 rods south. This last description was repeated upon the tax books of 1899 and 1900. In 1901 the county caused a survey and plat of this

property to be made, in which it was described as lot 16; and by this description it was also known on the tax books for the years 1902 and 1903. The defendants failing to pay the taxes of 1898, the premises were on November 9, 1899, sold to the plaintiff's assignor, who subsequently paid the taxes for the years 1899 to 1903, both inclusive. In the tax certificate issued upon this sale, the description appears as in the tax list of 1898, except that the call for a course north 45° west 4.22 chains was given north 45° west 14.22 chains. This action was brought to foreclose the lien. The court below found the description insufficient, and that the plaintiff was not entitled to recover for the taxes of 1898, 1899 and 1900; but rendered a decree of foreclosure for the subsequent taxes paid after the property was described as lot No. 16. From this judgment the defendants appeal. The plaintiff, in his printed brief, complains of so much of the decision of the court as refused to give him judgment for the taxes of 1898, 1899 and 1900.

1. Upon the oral argument, the defendants objected to the consideration of the errors assigned in plaintiff's brief, on the ground that the plaintiff had not complied with the provisions of rule 35 of this court, which requires an appellee taking a cross-appeal to file his brief of errors within 30 days after service of notice of appeal upon him. It appears that the transcript in this case was filed September 21, 1906, the appellant's brief on May 1, 1907, and the plaintiff's brief on May 18, 1907. No objection as to time was made when these briefs were filed, and no motion was made to strike either brief because filed out of time, both parties proceeding to the argument without any formal objection by either. We think this was a waiver of the rule, and that the appellees are entitled to have the errors assigned in their brief considered. This was the rule under the former statute (*Meade P., H. & L. Co. v. Irwin*, 77 Neb. 391), and we do not think it has been changed by the statute of 1905.

2. We do not think the mistake of the treasurer in writ-

ing 14.22 chains for 4.22, as appears upon the tax list, invalidates the certificate. The plaintiff is not seeking to obtain title to the land by the statutory proceedings, but to foreclose the lien. In such cases, the court will look to the statute as the foundation of the lien, and will regard no defects or objection which goes only to the manner of assessing or levying such taxes. *Otoe County v. Mathews*, 18 Neb. 466. The statute fixes the lien, and the valuation by the assessor furnishes the data from which the amount of the taxes can be ascertained by a mere arithmetical calculation, when the levies shall have been made by the proper authorities. The description upon which the assessor acted was correct, and the defendants cannot be prejudiced by a clerical mistake in the certificate of sale, when a reference to the tax books upon which this certificate was issued corrects the error.

3. The important question in the case arises from the use of the word east in the next call after the run of 80 rods, or 1,320 feet south. If this course is literally followed, it is altogether upon another governmental subdivision than that named; and, after following the next call west 45° north 4.22 chains, we are still outside of the limits of said southeast quarter of said northwest quarter. The next call is 68 rods north to the place of beginning. The defendants claim that this line must be run due north the distance indicated, and, as this would not close the survey, that there is no land at all embraced in the description. On the other hand, the plaintiff insists that, where the last call of a survey requires a return to the place of beginning, such survey must be closed, though both the course and distance given be disregarded in so doing; and that, applying the rule to this case, the last line should run to the place of beginning, though the course must be northwest, instead of north, and though the distance is greater than indicated by the survey. If we should accept this solution, we would have bounded a triangular tract in the southwest quarter of the northeast quarter, and a tract comprising perhaps a third of defendants' land. If this

is done, it follows that a portion of defendants' land has been valued and assessed with that of another proprietor. Where land owned by one person is assessed with land of another so that neither owner can determine the amount for which his property is liable, the entire tax is void. *Spiech v Tierney*, 56 Neb. 514.

4. We do not think that either of the interpretations suggested furnishes the correct solution of the question involved. "In listing land it must be described with particularity sufficient to afford the owner the means of identification, and not to mislead him. Cooley, Taxation (3d ed.), 740. And the rule would seem to be that "the designation of the land will be sufficient if it afford the means of identification, and do not positively mislead the owner or be calculated to mislead him." *Ib.* 745. The reason of the rule is that "such a mistake or falsity defeats one of the obvious and just purposes of the statute—that of giving to the owner an opportunity of preventing the sale by paying the tax." *Ib.* 747. These rules are laid down for the construction of tax deeds, which, taking effect only as the execution of a statutory power, should be construed with strictness; and it might well be argued that in an action to foreclose a lien there should be an interpretation more favorable to the validity of the taxes; but that question we do not deem it necessary to decide. In this case the defendants' land had been borne on the tax list for the years 1896 and 1897 in the name of Pasco & Murdock as a 21-acre tract in the southeast quarter of the northwest quarter of section 29. In 1898, 1899 and 1900 the description was precisely the same, except the use of the word east for the word west in one of the calls. The evidence shows that no other 21-acre tract was assessed to these parties, nor in the said southeast quarter of the northwest quarter of said section 29; and it appears that, if the defendants' land was not covered by the description in question, it escaped taxation for these years. Is it reasonable to say that the error in the description was such as to have misled the defendant had he presented him-

self at the treasurer's office and sought to pay the taxes on his 21-acre tract? Had he made any such attempt, or an examination of the tax list, it must have been obvious to him, as it is to us, that the person who copied the description from the tax list of 1897 upon the assessor's books for 1898 inadvertently substituted the word east for the word west, and that it was a mere clerical error. But this is not all. A description in a deed must be construed like any other document. If some part is inconsistent with the other parts, that which is repugnant may be rejected altogether, if sufficient remain from which the intention of the parties can be ascertained. The word east in this description is inconsistent with, first, the location of the land in the southeast quarter of the northwest quarter of said section 29; second, with the number of acres specified; and, third, with the remaining calls of the survey. If we reverse the courses, a mode which a surveyor adopts in cases of doubt, and run the last call 68 rods south from the place of beginning, and thence south 45° east 4.22 chains, we are at a point just 36 rods west of the southeast corner of the southeast quarter of the northwest quarter of said section 29, which demonstrates that the course from this corner should have been west, and not east. For cases holding that a point of the compass named in a survey may be construed to mean a different or opposite direction when it appears to have been written by clerical error, or is inconsistent with the remaining parts of the description, see *Adm'r of Barnard v. Russell*, 19 Vt. 334; *Mizell v. Simmons*, 79 N. Car. 182; *Johnson v. Bowlware*, 149 Mo. 451, 51 S. W. 109; *Warden v. Harris*, 47 S. W. (Tex. Civ. App.) 834. We are therefore of the opinion that the description, taken together, plainly shows that the course from the southeast corner of the southeast quarter of the northwest quarter of said section 29 should be west, and not east; that the word east was written for the word west by mistake, and that it should be read west. The description, so construed, is sufficient. This conclusion disposes of the objections urged by the defendants.

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We therefore recommend that so much of the decree as finds the plaintiff entitled to recover for the taxes of 1901, 1902 and 1903 be affirmed, the remainder thereof reversed, and the cause remanded for further proceedings in accordance with this opinion.

AMES, C., concurs.

FAWCETT, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, so much of the decree of the district court as found the plaintiff entitled to recover for the taxes of 1901, 1902 and 1903 is affirmed, the remainder reversed, and the cause remanded for further proceedings in accordance with the above opinion.

JUDGMENT ACCORDINGLY.

MASON BROWN, APPELLEE, v. CHARLES H. GRAHAM,
APPELLANT.

FILED DECEMBER 5, 1907. No. 14,968.

1. **Animals: RUNNING AT LARGE.** A dog is not running at large within the meaning of section 20, art. I, ch. 4, Comp. St 1905, when he is within calling distance and sight of the owner's family and under their control.
2. **Evidence examined,** and found to support the instruction of the court that no person has a right to kill a dog for past and finished misconduct of the dog so killed.
3. **Animals: STATUTE: CONSTRUCTION.** Section 4 of the act of 1877 (Comp. St., ch. 4, art. I, sec. 20) was intended to give protection to sheep and those domestic animals which are ordinarily the prey of dogs; and not to give the owner of one of the participants in a dog fight the right to kill the other dog.
4. ———: **INSTRUCTIONS.** Where a jury is instructed that the burden of proof was upon the plaintiff to show that defendant wrongfully killed the plaintiff's dog, the word wrongful is presumed to be used in its legal, and not its ethical, sense.

APPEAL from the district court for Nemaha county:
WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

H. A. Lambert and E. Ferneau, for appellant.

Stull & Hawxby, contra.

CALKINS, C.

The plaintiff and defendant were neighboring farmers, their residences being near together, and separated by a wire fence. Each owned a dog; and the two dogs were discovered fighting near the residences of the parties, and upon the defendant's side of the fence, by the defendant's hired man. While the latter was endeavoring to separate the dogs, and as the plaintiff's wife and children appeared upon the scene, the defendant came with a revolver and fired two or three shots at plaintiff's dog, some one or more of which proved fatal to the dog, and he died upon his master's premises, whither he had gone after the firing of the first shot. The plaintiff brought this action to recover damages for the loss of the dog. The case was tried to a jury, who found for the plaintiff in the sum of \$25, and from a judgment rendered upon such verdict the defendant appeals.

1. The district judge, at the request of the defendant, charged the jury that under the law of this state it is the duty of the owner of any dog to place upon the neck of such dog a good and sufficient collar, with a metallic plate thereon, upon which shall be inscribed the name of such owner; and that, if the owner of any dog permits the same to run at large without said collar and plate, he cannot maintain an action for the killing of any such dog while so running at large. The jury were also instructed, at the request of the defendant, that a dog is running at large when he leaves the premises of his owner, no one having control of said dog being near said dog; and the court, on his own motion, instructed the jury that "a dog is to be considered running at large when he is away from

the premises of his master, roaming at his will, and out from under the control of his master or owner." At the request of the plaintiff, the court further instructed the jury that, "if you believe from the evidence that prior to the shooting the dog that was killed was on the defendant's land, that said dog was within calling distance and in sight of the plaintiff's family and under their control, then and in that event the dog was not running at large." Of these latter instructions the defendant complains. These instructions were predicated upon section 5 of the act of 1877 (Comp. St. ch. 4, art. I, sec. 20), which provides that it shall be lawful for any person to kill any dog running at large on whose neck there is no such collar. We think the instructions, taken together, correctly defined the words running at large, and gave the defendant as favorable an interpretation of this section as he was entitled to.

2. There was evidence tending to show that the plaintiff's dog ran away at the first shot, and that the defendant continued shooting at him after he had ceased fighting and had returned to his master's premises; and a jury would have been justified from the evidence in finding that the fatal shot was fired after the dog had left the defendant's premises. Under these circumstances, the judge instructed the jury that no person has a right to kill a dog for past and finished misconduct of the dog so killed. The statute gives no license to a person to destroy the dog of another, although the dog may have no collar with the owner's name inscribed thereon, when the dog is upon the owner's premises, or in close proximity to the home of the owner, and under the control or within the call of the owner's family. In other words, when a dog is within a short distance of the owner's family, who have control of the animal, and within calling distance of said family, then said dog is not at large, although he may be on the premises of another person. We think this instruction was applicable to the evidence, and correctly states the law.

3. The defendant asked the court to charge the jury that if, at the time the defendant shot the dog of the plaintiff, the said dog was doing damage to the dog of the defendant, then and in that case the defendant had a right to kill said dog, and is not liable therefor; and this instruction was by the court refused. The act of 1877 was entitled "An act to prevent sheep and other domestic animals from being killed by dogs." Laws 1877, p. 156. Section 1 of this act made the owners of dogs liable for all damages that might accrue to any person by reason of such dog or dogs killing, wounding, worrying or chasing any sheep or other domestic animal belonging to such other person. Section 2 of the same act provided that, if two or more dogs owned by different persons shall kill, wound, chase or worry any sheep or other domestic animal, such persons shall be jointly and severally liable for the damage done by such dog; while section 4 provides that any person shall have the right to kill any dog found doing any damage aforesaid to any sheep or domestic animal. The defendant contends that his dog was a domestic animal, and that the plaintiff's dog was within the meaning of this statute doing damage to his dog, and that he therefore had a right to kill him. We cannot agree to such an interpretation of the statute. The title of the law and the provisions of the statute all show that the intent of the legislature was to give protection to sheep and those domestic animals which are ordinarily the prey of dogs, and not to give the owner of one of the participants in a dog fight the right to kill the other dog. In construing statutes, the causes which led to the enactment of the law are to be considered, and, if one interpretation would lead to an absurdity and the other not, we must adopt the latter. There was therefore no error in refusing this instruction.

4. In one of the instructions given by the district judge the jury were told that a dog is personal property, and has a money value which the owner may recover from one who wrongfully kills the same; and in another that the burden of proof was upon the plaintiff to show that the

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defendant wrongfully killed the plaintiff's dog. The defendant complains of the use of the word "wrongful" in this instruction, and argues that the killing might have been lawful and yet wrongful. The standard of wrong must be a legal standard, and nothing can be said to be wrong in law which is lawful. If the defendant apprehended that the jury might understand the word "wrongful" to include a moral or ethical wrong, he should have prepared and presented an instruction covering that point; otherwise it must be assumed that the jury understood the word in its ordinary legal sense.

There being no error in the record, we recommend that the judgment of the district court be affirmed.

AMES, C., concurs.

FAWCETT, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

IRA C. MUNGER, APPELLEE, v. JOHN O. YEISER ET AL.,
APPELLANTS.

FILED DECEMBER 5, 1907. No. 14,982.

1. **Injunction: REPEATED TRESPASSES.** The destruction of a fence, and threatened repetition thereof, by a trespasser, as often as the fence may be replaced, entitles the owner to relief by injunction against the invader, even though the latter may not be insolvent. *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364, followed.
2. ———: **DEFENSES.** In an action to enjoin a trespass, a defendant cannot defeat the plaintiff's action by showing an outstanding right in a third party to have one of the deeds in the plaintiff's chain of title declared a mortgage.
3. ———: **PARTIES: SUBSTITUTION: EVIDENCE.** Where, in an action brought to restrain a trespass upon real property, the same is sold during the action, and the vendee thereupon substituted as

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plaintiff, such substitution does not modify the issues; and evidence taken before such transfer should be considered in the same manner as if there had been no change of parties.

4. **Appeal: EVIDENCE.** Where, after the introduction in evidence of an abstract of title under section 66, ch. 73, Comp. St. 1905, the original records referred to in such abstract are received and show the same facts, no error in the introduction of the abstract can be assigned.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

John O. Yeiser, for appellants.

Carl E. Herring, contra.

CALKINS, C.

The plaintiff claims to be the owner of lots 12 and 13, block 99, Dundee Place, Omaha, by authority of a sale to him made pursuant to a decree of the district court for Douglas county. After the conveyance to plaintiff by the sheriff's deed made in pursuance of such decree, and on the 20th day of April, 1903, the plaintiff conveyed the lots in question to one Chester W. Stem, who on the 14th day of May, 1904, reconveyed the same to the plaintiff. John Jeffries & Sons owned some adjoining lots, with which the lots in question had been inclosed, and, it appears, occupied by tenants of Jeffries' property; but Jeffries disclaimed any interest therein by reason of any adverse possession or otherwise. In September, 1903, defendants made an offer to Jeffries to purchase the property owned by the latter, Jeffries to give a warranty deed for the lots which he claimed to own, and a quitclaim deed to said lots 12 and 13, to convey the interest acquired by adverse possession. Just what response this offer elicited does not appear; but it is shown that, when Jeffries later conveyed his property to the defendants, nothing was said about any right in lots 12 and 13, and it nowhere appears that the defendants ever obtained any conveyance of any right in these lots from anyone claiming possession thereof.

When Stem acquired the title to lots 12 and 13, he removed the fence which had inclosed the same with the Jeffries property to the boundary line between the two tracts; and this fence the defendants demolished. It was replaced by Stem, and again razed by the defendants, who, it is charged, threatened to destroy it as often as it should be replaced. Stem brought this action to restrain the defendants from further trespass. When Stem conveyed to the plaintiff Munger, the latter was substituted as party plaintiff, and the case proceeded to trial. There was a finding and decree in favor of the plaintiff, from which the defendants appeal.

1. It is urged that an action at law afforded the plaintiff an adequate remedy, and that a suit for an injunction will not therefore lie. If a trespass to property is a single act and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere. The principle determining the jurisdiction embraces two classes of cases, and may be correctly formulated as follows: (1) If the trespass, although a single act, is or would be destructive, if the injury is or would be irreparable, that is, if the injury done or threatened is of such a nature that, when accomplished, the property cannot be restored to its original condition, or cannot be replaced, by means of compensation in money, then the wrong will be prevented or stopped by injunction. (2) "If the trespass is *continuous* in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act *if it stood alone*, then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions. In both cases the ultimate criterion is the inadequacy of the legal remedy." 4 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1357. This case clearly falls within the second class mentioned by Mr. Pomeroy. The rule has been applied by this court to facts precisely similar in the

case of *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364, where it is held: "The destruction of a fence, and threatened repetition thereof by a trespasser as often as the fence should be replaced, entitles the owner to relief by injunction against the invader, even though the latter may not be insolvent."

2. It is claimed by the appellant that the plaintiff failed to establish title in himself. The plaintiff claims through the foreclosure of a mortgage executed by Anna J. Fitch, then owner of the premises, who afterwards conveyed to one Patterson. Patterson was made a party defendant, and was served with summons; but Mrs. Fitch does not seem to have been summoned, and did not appear. Patterson filed an answer, setting up that his deed was a mortgage, and asking that it be foreclosed. It is well settled that a mortgagor who has conveyed the fee is not a necessary party to a suit to foreclose. It is also well settled that, while a conveyance intended as a mortgage may be enforced as such between the parties and those having notice, even though no defeasance is contained therein, as to subsequent purchasers and incumbrancers without notice the instrument is to be taken for what it purports to be. In this case it is not contended that the plaintiff had any knowledge that the deed by Fitch to Patterson was intended as a mortgage, nor any notice of such claim, except that afforded by the filing of the answer by Patterson in the foreclosure suit. Whether a purchaser at a sale in pursuance of a decree in a foreclosure suit takes his deed with notice of the facts alleged in an answer and cross-petition filed in such suit by a defendant who appears upon the record as the owner of the fee it is not necessary to determine. The defendants show no transfer to themselves of any right in or claim to the premises from any of the persons whom they assert adversely occupied the same. They are naked trespassers without color of right. Against such the plaintiff's title is good, even though there be an outstanding right to redeem by a third party.

3. It appears that, while this action was being prosecuted in the name of Stem, the deposition of Jeffries was taken. At the beginning of the trial the defendants moved to suppress this deposition, on the ground that the same was taken before Munger was substituted as plaintiff, and that it was not properly certified. This motion was overruled, and this action of the trial court is assigned as error. The defendants do not point out in what particular the certificate is lacking, and we discover no defect therein. In support of the other ground we are cited to *Lange v. Braynard*, 104 Cal. 156, and *Edgell v. Smith*, 50 W. Va. 349. The former holds that a person made a party to the action by order of the court is not bound by a deposition taken before such order; and the latter that a deposition proving matter not in the original bill when taken cannot be read to support substantive matter in an amended bill afterwards filed. Neither of these cases is in point. Section 45 of the code provides that, in case of a transfer in interest like that here shown, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. In this case the parties chose the latter course; but it did not in any manner change the issues, nor was the defendant at all affected thereby. It is precisely the same as if the assignee Munger had chosen to prosecute the action to judgment in the name of Stem. It follows that the court rightly overruled the defendants' motion to suppress.

4. The only remaining assignment of error is that the court erred in receiving abstract of title of the land in question. The objections to the admission of the abstract at the time it was offered were, first, that it did not show the title to the lots in controversy in the plaintiff; second, that it did not show sufficient of the foreclosure proceedings; and, third, that it was incompetent, irrelevant and immaterial. Section 66, ch. 73, Comp. St. 1905, provides, in substance, that an abstract certified to, and

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issued by a bonded abstractor, shall be received in all courts as *prima facie* evidence of the existence of the record of all deeds, mortgages and other instruments, conveyances or liens affecting the real estate mentioned in such abstract; and that such record is as described in such abstract of title. It is not suggested in what particular the abstract does not conform to the statute; but it is said that such abstract would not establish the facts necessary to prove title in an ejectment suit, and consequently would not suffice in this case. It is enough to say that concerning the only question in dispute, viz., the character of the proceedings in the foreclosure suit, the original records were introduced, and the plaintiff's case does not therefore depend upon the abstract.

We therefore conclude that the judgment of the district court should be in all things affirmed, and we so recommend.

FAWCETT and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

PHOEBE BLISS, APPELLEE, V. PERSE BECK ET AL.,
APPELLANTS.

FILED DECEMBER 5, 1907. No. 14,997.

1. **Continuance: REVIEW.** In the absence of any showing on the part of defendants that they were unprepared to meet, or were surprised by, the allegations in an amendment to the petition allowed at the close of the trial, the decision of the district court refusing a continuance on account of the granting of such amendment will not be reviewed.
2. **Witnesses: CREDIBILITY: IMPEACHMENT.** The fact that a witness was intoxicated at the time of the happening of the events about which he testifies is relevant, and may be shown without first asking the witness upon cross-examination whether he was intoxicated.

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3. **Damages: ACTION FOR INJURIES: EVIDENCE.** In an action by a married woman for personal injuries, it is proper to show that she has been incapacitated by reason of her injuries from performing labor, for the purpose of showing the nature and extent of her injuries. *Pomerene Co. v. White*, 70 Neb. 171, followed.

APPEAL from the district court for Antelope county:
JOHN F. BOYD, JUDGE. *Affirmed.*

E. F. Gray and O. A. Williams, for appellants.

M. F. Harrington and C. H. Kelsey, contra.

CALKINS, C.

The defendants Beck and Perrin were licensed liquor dealers, and the defendant the Metropolitan Mutual Bond & Surety Company was their surety upon the bond given by them to obtain their license. The charge was that on the 18th day of November, 1905, the defendants Beck and Perrin sold liquors to one Joseph Prevo, who became intoxicated, and, while in that condition, attempted to drive along the public highway upon which the plaintiff, with her husband, was traveling; that Prevo, by reason of his intoxication, lost control of the team which he was attempting to drive, and it collided with the vehicle in which the plaintiff was riding, causing the breaking of her leg, and other injuries. The plaintiff brought this action upon the bond given by the defendants to procure such license. There was a trial to a jury, and a verdict for the plaintiff in the sum of \$2,000, and from a judgment upon this verdict the defendants appeal.

1. While the plaintiff's petition set forth the bond, and alleged that the defendants Beck and Perrin were engaged in the business of liquor dealing, it did not contain the allegation that the license was granted. At the beginning of the trial the defendants Beck and Perrin, for themselves, objected to the reception of any evidence, on the ground that the petition did not state facts sufficient to constitute a cause of action against them, which was over-

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ruled. After both parties had rested, the plaintiff asked leave to reopen the case for the purpose of introducing evidence to show that the license was formally granted, and to amend her petition so as to allege the granting of the same. This was granted over the objection of the defendant, the surety company, which thereupon asked that the case be continued to give it opportunity to make its answer to the amended petition. The court refused the request for a continuance, but granted one hour to the defendant to prepare the answer. The defendant waived the hour, on the ground that the time was insufficient. The action of the court in reopening the case and permitting the amendment is assigned as error. Section 144 of the code provides that the court may, in furtherance of justice, and on such terms as may be proper, permit the amendment of any pleading by inserting other allegations material to the case. It has been held that this section confers upon the court an almost unlimited power of amendment (*Deck v. Smith*, 12 Neb. 389), and that prejudicial error cannot be predicated upon an order allowing a pleading to be amended when the amendment does not change the issues nor affect the quantum of proof as to any material fact. *Cate v. Hutchinson*, 58 Neb. 232. The whole matter of amendment is within the discretion of the trial court, and its action will only be reviewed where an abuse of discretion is apparent. In this case the complaint seems to be directed to the fact that the court refused a continuance. There was no showing on the part of the defendants that they were surprised by the new allegation, nor that they were not as well prepared to meet the same at that time as they could hope to be at any future date. In short, there was no showing of fact whatever; and, without such showing, it would be impossible for this court to say that there was any abuse of discretion either in allowing the amendment or refusing the continuance.

2. The defendants had made application for continuance to procure the testimony of one John Herrin, in which it was alleged that Herrin would, if present, testify

that he was with Prevo at the time of the accident, and that he, and not Prevo, was driving the team. The plaintiff offered to admit that Herrin, if present, would testify as stated, and upon that admission the continuance was refused. The plaintiff called witnesses to testify that Herrin was drunk shortly previous to the accident; and this testimony was admitted over the objection of the defendants as going to the credibility of the witness Herrin. Of this ruling the defendants complain, and argue that such evidence was not admissible without first asking the witness upon cross-examination as to his condition. It is a general rule of evidence that before the credit of a witness may be impeached by proof that he has made statements out of court contrary to what he has testified to at the trial he must be first asked the time, place and person involved in the supposed contradiction. It is said that common justice requires that he should have an opportunity to recall the facts and to explain the nature, circumstances and meaning of what he is alleged to have elsewhere said, and, if necessary, to correct the same. Neither the rule nor the reason for the same applies to a case where it is sought to show the physical condition of the witness to be such as to render him incapable of perceiving, understanding or remembering the facts to which he has testified. The apparent inconsistency of a verbal statement may frequently disappear when the circumstances under which it was made are explained; but the physical condition of a witness in respect to his perceptive powers is a fact, which can only be admitted or denied. This precise question has been before this court in *Willis v. State*, 43 Neb. 102, where it was expressly held that it was competent in a trial of a criminal case for the state to show in rebuttal that a witness who testified for the defendant was intoxicated at the time of the happening of the events about which such witness testified. There was therefore no error in the admission of this testimony.

3. The petition shows that the plaintiff is a married woman, living with her husband; and there is no allega-

tion that she has ever engaged in business on her separate account, nor of her intention so to do. It appears that before the accident she did the housework for her husband, herself and 7 children, and helped her husband in doing chores; that for five weeks after the accident she was unable to do any work, and since that time has been partially disabled from performing her ordinary duties. There was testimony introduced tending to show that her injuries are permanent. The defendant requested the following instruction: "If you should find in favor of the plaintiff, you are not to allow her anything for lost time, or depreciated earning capacity, because, there being no evidence that she engages in any business or work other than a wife's domestic duties, her husband only can recover for her loss of time or earning capacity." This the court refused, but gave the following: "No. 11. If the jury shall find for the plaintiff, then it will be their duty to allow her such amount of damages as will compensate her for the injuries sustained. The elements entering into damages and to be considered by the jury are as follows: (1) If the injuries sustained have impaired the plaintiff's ability to labor, then such sum as the jury find from the evidence will reasonably compensate her for such loss, if any; (2) if the plaintiff has endured pain and suffering and an impairment of her health by reason of said injuries, then the jury shall allow her such reasonable sum as will compensate her for any pain and suffering that she has endured and that in the future she will endure. There is no definite rule by which you can determine the exact amount thus to be allowed. The law in its wisdom puts no definite price on human pain and suffering, but leaves that entirely to the sound judgment and discretion of the jury. What amount the plaintiff shall recover for pain and suffering is exclusively a question for the jury; (3) if the jury find that as a result of the injuries the plaintiff has been and is permanently lame, then such sum as will reasonably compensate her for this inconvenience. No. 12. If you find in favor of the plaintiff, you are not to allow

her anything for lost time, because, there being no evidence that she engages in any other business or work other than a wife's domestic duties, her husband only can recover for her loss of time." It is contended by the appellant that the plaintiff is not entitled to recover for her depreciated earning capacity, and that the instruction No. 12, given by the court, permitted the jury to estimate that element of damage. In support of this contention the case of *City of Central City v. Engle*, 65 Neb. 885, is cited, and it is argued with much insistence that, under the rule adopted in that case, a married woman who has received permanent physical injuries wrongfully inflicted by another cannot in a suit against the wrongdoers recover for her diminished earning capacity, unless she had actually engaged in business on her own account, or intended so to do before the injury. In the above case the pecuniary damages for loss of wages were submitted to the jury as the measure of plaintiff's recovery, and for this action of the trial court the case was reversed. Under the well-settled rule that a case is not authority as to any point not necessary to be passed upon in order to decide the cause, the case under consideration goes no further than to determine that the direct pecuniary injury for loss of wages is in such cases to be recovered in an action by the husband, and not by the wife. In the case of *Pomerene Co. v. White*, 70 Neb. 171, this court had before it the question we are now considering. It was there urged that an instruction which informed the jury that it could take into consideration the probability of the injuries received by the plaintiff being permanent, and the extent, if any, to which the injuries had incapacitated her for labor, was in conflict with the *Engle* case; but the court there said: "In states in which married women are permitted to contract for themselves and in which they are permitted to engage in business or employment in their own behalf, it has been frequently held that, in an action for personal injuries, it is proper to prove that a married woman is incapacitated from labor as the result of her injuries, for the purpose of showing

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the nature and extent of her disability. This rule seems founded on sound reason, because it is apparent that the mere fact that a married woman is not engaged in a separate business at the time she is injured should not deprive her of the right to recover for a disability that would ever afterwards bar her from engaging in an occupation on her own behalf." The language above quoted is applicable to this case, and meets with our approval. We therefore conclude that the instructions as given by the court correctly presented the law to the jury, and that there was no error in refusing the request of the defendant to give the instruction above referred to.

We therefore recommend that the judgment of the district court be affirmed.

FAWCETT and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WILLIAM J. CONNELL V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1907. No. 15,112.

1. **Contempt.** A prosecution for contempt of court is a criminal proceeding. The defendant is entitled to the benefit of any reasonable doubt as to his guilt.
2. ———: **VENUE: TRIAL BY JURY.** When the acts complained of are done in the presence of the court, the defendant is not entitled to a change of venue on account of alleged prejudice of the court, nor is he entitled to trial by jury. The fact that the prosecution for contempt is postponed until the end of the proceedings in which the contempt is alleged to have been committed will not change the character of the prosecution.
3. ———: **INFORMATION: FINDINGS: EVIDENCE.** When the prosecution for contempt is based upon language used by counsel in open court in the trial of a cause, and the words used are not in themselves necessarily contemptuous, and the court orders a

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prosecution instituted by information filed by the county attorney, and a formal trial is had, there being no statement of the court in the record as to the conduct of counsel upon which the proceedings are based, general findings of the court will be considered as predicated on the evidence in the record, and unless supported by that evidence will not sustain a judgment of guilt.

ERROR to the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed.*

William J. Connell and Hall & Stout, for plaintiff in error.

W. T. Thompson, Attorney General, Grant G. Martin and James P. English, contra.

SEDGWICK, C. J.

This is in some respects the most extraordinary record that the writer has ever been called upon to examine. It contains over 500 sheets of closely typewritten matter and some 40 odd sheets of fine print. All of this record is supposed to be devoted to presenting, emphasizing and illustrating a continuous controversy between the court and the defendant, who is a member of the bar of Douglas county, in the trial of a misdemeanor case, entitled "State of Nebraska v. Samuel E. Howell," in which that defendant was indicted with some 40 others. This controversy extended not only through the trial of the case, but through the settlement of the bill of exceptions in that case, and throughout the trial of this case which is now presented to this court. The record clearly shows that the trial judge, which would, of course, be presumed without such showing, was animated throughout by a fine sense of justice, and was using every possible effort to maintain the dignity of the court and the honorable reputation of the bar of the state, and was conscious of the character of the disgraceful proceedings throughout, and yet was unable to preserve that order and decorum which is essential to the due administration of justice. The defendant is one of the able lawyers of the state, of long practice in all the

courts, and has held positions of great influence in the public service. Judging from this record, he is evidently fearless in the defense of the interests of his clients, and is willing, if it seems at the moment to be necessary, to make great sacrifices to promote their cause. These characteristics, of course, challenge the admiration of the courts, and yet it is equally manifest, we think, from this record that due consideration on the part of the defendant of the duties of counsel in the trial of causes and the proper exercise on his part of the ability of a strong lawyer to assist the court in the discharge of its arduous duties would have avoided all difficulty, and so it may be said that the record shows that the defendant is at fault. It is not necessary to go into this voluminous record in detail. That part of it which it will be necessary to quote in determining the legal questions presented will sufficiently illustrate the character of the proceedings. At the end of the trial of the principal case, the court directed the county attorney, who is also the attorney for the prosecution in the principal case, to file an information against this defendant, who was the leading counsel for the defendant in the principal case, charging the defendant with contempt of court in the process of that trial. In making this order the court directed the precise language used by the defendant, and apparently taken from the record, preserved of the former trial, which should be charged in the information against the defendant as the ground for the proceedings for contempt. There were six counts in the information filed by the county attorney, and the defendant was found guilty as to two of the respective charges. It will therefore be unnecessary to discuss the remaining accusations.

1. The first count in the information upon which the defendant was found guilty charged: "After the said court had heard the said William J. Connell in his argument of the law of said case, on behalf of the defendant therein, and after the said court had announced to the said William J. Connell that the said court did not care to hear

any further argument on the law of said case, the said William J. Connell, in answer to said announcement of said court, did then and there in a disorderly, contemptuous and insolent manner, and in a loud, boisterous, disrespectful and sarcastic tone of voice, with the intent on the part of said William J. Connell then and there and thereby to intimidate, humiliate, insult and lower the dignity of the said court in the presence of a large number of bystanders and visitors, then and there being present in said court, use the following language toward said court, to-wit: 'I don't want to say that I have lost faith in the court, but I will go to the extreme of saying that I do not think that any law that I could produce to your honor would be of much effect. I have got it (meaning the law) out of the Nebraska reports, and the supreme court is responsible for the law. I do not make the law. I merely find it and bring it into the court'—contrary to the form of the statute in such cases made and provided, and in contempt of said district court and its dignity and against the peace and dignity of the state of Nebraska." After the trial of the Howell prosecution an attempt was made to settle the bill of exceptions, and it appears from the record that a transcript of the evidence taken in that case was procured and was agreed upon between the counsel for the respective sides, but had not been allowed by the court and ordered to be made a part of the record. From this transcript extracts were presented and offered in evidence. Some objections were made to their being received. After some hesitancy they appear to have been received, and also appear to have been relied upon by both parties to this controversy as substantially showing the facts. In settling the bill of exceptions in this case, the judge has certified that the transcripts alluded to are not correct, and refers to the examination of the defendant, Connell, by the court as showing the incorrectness of these transcripts. This examination shows that the transcripts were not a part of the records of the court, and that the copy of the evidence of the former case from which the transcripts were

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taken had never been allowed by the court as the bill of exceptions in that case. It is, however, admitted upon all hands that the supposed offensive language of the defendant was preceded by more or less controversy between the parties, and no attempt is made by any one to show what that controversy was, except as disclosed in the transcripts referred to. Neither has any one attempted seriously to show in what respects these transcripts are defective or incorrect, and as they are in evidence, and assumed by counsel on both sides to be substantially correct, we think they must for the purposes of this case be so considered. It appears then from the record that, while the prosecuting attorney was questioning a witness in the trial of the Howell case in regard to some record that had been received in evidence, a discussion took place which led to the supposed offensive language of this defendant. This discussion was as follows: "Q. Now, referring to the entry opposite C. B. Havens & Company under June 10, 1905, the figures 5 and two ciphers following, what does that mean, \$5 or what? Objected to for the reason that the book itself is the best evidence. We object that it is immaterial and irrelevant. We further object that it does not tend to sustain the charge or does not tend to sustain any count in this indictment. We further object that it relates to a date and a time prior to the time when the existing law under which this prosecution went into force. Objection overruled and defendant excepts. Mr. Connell: That was a point I wanted to present, your honor, but if your honor has made up your mind not to hear any discussions or presentation here why I don't care to go into that. The court: You have argued so much law that I thoroughly disagree with that I have kind of lost faith in the law you present to the court, and if I thought there would be anything gained by this discussion I would be glad to hear it. Mr. Connell: I don't want to say I have lost faith in the court, but I will go to the extreme of saying that I do not think that any law that I could produce to your honor would be of much effect. The court: Per-

haps that is because you have argued bad law to the court for a long time, and the court, I suppose— Mr. Connell: I have got it out of the Nebraska reports, and the supreme court is responsible for the law. I do not make the law. I merely find it and bring it into court. Objections overruled. Defendant excepts.”

It appears to be conceded in the findings of the trial judge that the language used by defendant would not necessarily in itself be contempt. The contempt was considered to consist in the manner of the defendant and the circumstances under which the language was used. The foregoing extract from the transcript illustrates two unfortunate conditions that existed during the whole trial. The trial judge was led into controversy and argument when nothing was required but prompt decision. He allowed himself frequently to be interrupted when attempting to explain the grounds of his ruling, and habitually allowed extensive argument after having indicated his opinion upon the point under discussion. The objection to the question propounded to the witness, it appears, was stated at large by counsel, and after the objection had been flatly overruled, and counsel had taken his exception to the ruling, counsel stated that the point was one that he wanted to present, but if the mind of the court was made up not to hear any presentation that he would not care to go into it. Ordinarily such a remark as this in open court would be regarded as more or less offensive. The implication plainly is that the point determined by the court was an important one; that it merited discussion, and the insinuation is that the court had made an important ruling without proper consideration of the matter, and that this indicated a condition of the mind of the court that made it undesirable to discuss the question. What we mean to say is that under some circumstances such a remark as this of counsel would be subject to such criticism as above, but the reply of the court would indicate that such discussions were anticipated and not rarely to be expected. The remark of the court that he had lost

faith in the law presented by counsel might be understood to call for some excuse or explanation on the part of counsel. The answer of counsel that "I do not think that any law that I could produce to your honor would be of much effect," taken literally, is merely a confirmation of the statement of the court. The difference in the two expressions consists in the inference to be drawn from each respectively. The one undoubtedly infers that counsel was in the habit of citing law to the court which was unreliable; while the other infers that the court was in the habit of disregarding the law when it was correctly cited by counsel. Such language on the part of either court or counsel can be accounted for only by the excitement which comes from the heat of unnecessary discussion and of a character to be carefully avoided. The court, instead of taking immediate measures to prevent such discussion in the future, continues it by a remark calculated to produce the reply which followed. The court intimates that counsel has attempted to deceive him by citing unreliable precedents, and counsel attempts to justify by stating the source of his authorities, a source which is regarded as legitimate, at least in the courts of this state. Thereupon the objection is again overruled, and another exception taken.

The charge of the other count of the information upon which the defendant was found guilty is as follows: "The defendant did then and there in the presence and hearing of said court, and in the presence and hearing of the presiding judge thereof, said court then and there being in session as aforesaid, and engaged in the trial of said case, unlawfully and wilfully behave toward said court in a disorderly, contemptuous and insolent manner, in that then and there and during said trial of said case, and in the presence and hearing of the jury impaneled in said case as aforesaid, and after the said court had passed upon the qualifications of a certain witness, called by the said defendant in said case to testify in said case, and had excluded said witness from testifying in said case, pursuant

to an order of the said court theretofore made at the opening of the trial of said case forbidding the witnesses in said case to be present in said court during the progress of the said trial of said case when other witnesses were testifying therein, the said William J. Connell did then and there in a disorderly, contemptuous and insolent manner, and in a loud, boisterous, disrespectful and sarcastic tone of voice, with the intent on the part of said William J. Connell then and there and thereby to intimidate, humiliate, insult and lower the dignity of the said court in the presence of said jury and in the presence of a large number of bystanders and visitors then and there being present in said court, use the following language toward said court, to wit: 'Now, your honor, I contend and insist that to exclude any witness called by the defense, simply because that witness has violated some order of the court, and the defendant himself is not a party to it, would be not only the rankest injustice, but would be error of the grossest character.' " We cannot find any other substantial proof of the exact language attributed to the defendant in this count of the information and the preceding controversy that led to its use, except that contained in the transcripts from the proposed bill of exceptions above referred to, and for the reasons already given, we think that we must take those transcripts as furnishing the evidence upon that point, and they show the following proceedings: "George E. Griffith, called as a witness on behalf of the defendant, being first duly sworn, was examined in chief by Mr. Stout, of counsel for the defendant, and testified as follows: Q. You may state your name to the court and jury. A. George E. Griffith. Q. Where do you reside? A. 2823 Dewey avenue, Omaha. Q. How long have you lived in Omaha? A. Since the 16th of March, 1905. Q. What is your business? A. I am employed by the Union Fuel Company. Q. Where is the Union Fuel Company's place of business? A. 1614 Farnam street. Q. What is the nature of your business with the Union Fuel Company? A. I am employed in the capacity of bookkeeper

and solicitor. Q. In what way do you exercise that duty of yours as solicitor? Mr. Murdock: Has this man been in the court room? Immediate cross-examination by Mr. Murdock: Q. Have you been in the court room during the progress of this trial? A. I was in here for a short time one evening. Q. At the time of the taking of testimony? A. Yes; I was in here Thursday evening, I believe; no, it was Wednesday evening. Mr. Murdock: Object to the witness testifying. Mr. Stout: His instructions have been to stay out. Mr. Connell: That can make no difference. Mr. Connell: Were you aware that you would be a witness when you were in here that evening? The court: The court allowed Mr. Sunderland to testify because he was one of the defendants. Mr. Stout: If the witness is disqualified— Mr. Connell: My position is that he cannot be disqualified. The court: The court made the order, and told counsel that order would be enforced. Mr. Connell: I want to show by this witness that he was not present when your honor made that order; that he did not know anything about it; that he never expected to be a witness when he was called; and we wish to state, professionally, to the court, on my part and on behalf of my associate, Mr. Stout, we did not know that we would have to call him as a witness. I did not have the remotest idea that he would ever be a witness until well into yesterday; and, that being so, we ask and demand that his testimony be taken. Now, my understanding of the rule is this, your honor, that a party cannot be deprived of the right to use a witness simply because the witness violates some order of the court. If this witness has violated any order of the court, knowing that he was to be a witness, and has come into the court room, he would be liable for contempt of court; he would be punishable, himself, for contempt of court. But it cannot be, your honor. Suppose that Mr. Howell, in place of being on trial for an act in restraint of trade, was on trial for his life, and that this was the only witness by whom he could prove his innocence, and the witness has violated the order of the

court; is it possible that he must be denied his right to present that testimony, and go upon the executioner's platform, because the witness, the only witness who could testify in his own behalf, has wilfully, we will say, violated an order of the court? Now, your honor, I contend and insist that to exclude any witness, called by the defense, simply because that witness has violated some order of the court, and the defendant himself is not a party to it, would be not only the rankest injustice, but would be error of the grossest character. The court: Then we will have error of the grossest character. Now, I do not like that remark—grossest, rankest injustice. Now, Mr. Connell, you have been making free use of such remarks, and some time you are going to find out this court is not going to permit that any more. Mr. Connell: I do not believe, your honor; I do not know what your honor's ruling would be. I am merely submitting that proposition, and I thought the mere statement of the result of that rule would satisfy your honor that it would not be the proper thing. The court: The trouble is you have tried to blackguard the court all through this case by insinuations, and you are undertaking to carry things with a high hand, whether right or wrong. This is not a murder case, and the court has a right to make any reasonable rule, and it must not be violated. In this case the defendant is charged with a misdemeanor. The court would have no way of enforcing its order if any witness could come in here, if he sees fit, and violate the order of the court. Mr. Connell: He could be punished for contempt. The court: The court is not looking for contempt cases at all. The court is looking for the enforcement of its orders. The court allowed Mr. Sunderland to testify, even though he had been in the court room while testimony was being given, because he was one of the defendants in this case. Mr. Connell: We except to the ruling of the court."

From this it appears that, when defendant, as counsel in the case, stated his position to the court that the wit-

ness Griffith could not be disqualified, the court replied: "The court made the order, and told counsel that order would be enforced." This ought to have ended the controversy. This was a plain intimation that the court had considered and had determined that the order made at the commencement of the trial, excluding all witnesses from the court room, and directing that no witness should be examined who remained in the court room in violation of the order, applied to the witness Griffith; and, the court having come to this determination, there was no further necessity for debate; but it will be seen that Mr. Connell proceeded to argue the question at large. No one appears to have objected to this argument. The argument appears to be substantial, and on its face would appear to be in good faith, except for the fact that the point had already been determined. But the court listened to the argument. No attempt was made to prevent or restrict it, and at the close of the argument the court treated it as an attempt on the part of counsel to "blackguard the court." It must be considered that the language used by counsel was not as choice and delicate as might be desired. He tells the court in closing his argument that "to exclude any witness called by the defense (under the circumstances then existing) would be not only the rankest injustice, but would be error of the grossest character." The court apparently considered that the point had already been decided; and counsel himself concedes that there was reason at the time to suppose that the court would exclude the testimony, and he characterizes the proposed action of the court as "the rankest injustice, and error of the grossest character." We are not now considering the tone of voice, the gesticulations, or the manner of the defendant, other than as indicated by the language itself. Mr. Connell, as a witness in his own behalf, testified that he was applying, at least in his own mind and intention, his characterization of the nature of such a ruling to the illustration which he himself had proposed in his argument, and that he did not at the time have in mind charac-

terizing the proposed ruling of the court upon the question before it. His explanation at the time to the court, as disclosed by the record, tends to support him in this testimony, and might have been taken as purging him of any intentional contempt of court in making the offensive remark—"I do not know what your honor's ruling would be. I am merely submitting that proposition, and I thought the mere statement of the result of that rule would satisfy your honor that it would not be the proper thing." The reply of the court to this expression shows that under ordinary circumstances the explanation of counsel would have been regarded by the court as sufficient. It was only in the light of the general conduct of counsel during the course of that trial that the court regarded the language as offensive. Undoubtedly very much must be confided to the discretion of the trial court in the characterization of the language of counsel which might or might not be regarded as contemptuous, so much depends upon the circumstances surrounding the use of the language, and upon the manner of counsel in using it, and other matters, that the record cannot be made to show that a reviewing court must in ordinary cases rely upon the judgment and discretion of the trial court, which is based in a large degree upon his personal observations and knowledge. This subject will be considered further in connection with the allegations of the information that the defendant acted in a "disorderly, contemptuous and insolent manner." This is a criminal proceeding in its nature. The defendant is entitled to the benefit of any reasonable doubt as to his guilt. The language used by the defendant as charged in these two counts of the information; under the circumstances disclosed by the evidence, and in the light of the inducements and explanations contained in the record, would not of itself furnish sufficient proof that the defendant beyond reasonable doubt committed and intended to commit a wilful contempt against the authority and dignity of the court.

2. This is not a prosecution for a constructive contempt.

The acts complained of were done in the presence of the court itself. The fact that the court delayed the proceedings for contempt until after the principal case was finished would not change the character of the proceedings. It was the duty of the court to hear the matter himself, and the defendant's application for a change of venue was rightly overruled. These two propositions are elementary, and in the view that we take of the case they become unimportant, except as they bear upon the question which we come now to consider, and which we deem to be the most difficult and important question in the case. Did the defendant act in "a disorderly, contemptuous and insolent manner"? Did he speak to the court "in a loud, boisterous, disrespectful and sarcastic tone of voice"? Did he intend and attempt "to intimidate, humiliate, insult and lower the dignity of the court"? It appears to be conceded that the language used by the defendant might have been used with such manner and purpose as these questions indicate, or might have been used in the heat of the debate without malicious intent with the purpose as explained and insisted upon in the testimony of the defendant. The trial court saw the conduct of the defendant. He observed his manner, his tone of voice, and the circumstances under which he spoke. He was manifestly, as shown by the record, endeavoring to do his whole duty, and to conduct the trial in a seemly and appropriate manner. He has made a general finding in the case that the defendant "unlawfully and wilfully did behave toward said court in a disorderly, contemptuous and insolent manner, in that then and there and during the trial of said case, and in the presence and hearing of the jury impaneled in said case as aforesaid, and after said court had passed upon the qualification of a certain witness, called by the said defendant in said case to testify in said case, and had excluded said witness from testifying in said case, pursuant to the order of said court theretofore made at the opening of the trial of said case forbidding witnesses in said case to be present in said court during the

progress of said trial of said case when other witnesses were testifying therein, the said William J. Connell did then and there in a disorderly, contemptuous and insolent manner, and in a loud, boisterous, disrespectful and sarcastic tone of voice, with the intent on the part of said William J. Connell then and there and thereby to humiliate, intimidate, insult and lower the dignity of the said court in the presence of said jury and in the presence of a large number of bystanders and visitors then and there being present in said court, use the following language toward said court, to wit: 'Now, your honor, I contend and insist that to exclude any witness called by the defense, simply because that witness has violated some order of the court, and the defendant himself is not a party to it, would be not only the rankest injustice, but would be error of the grossest character.' That said language was used by the defendant wilfully, unlawfully, contumaciously, and in contempt of this court, and was an attempt of said defendant to obstruct the proceedings and hinder the due administration of justice in said case then pending and on trial before this court. The court therefore finds the defendant guilty as set forth in the first, second, third and fourth counts of the information."

It is contended that these findings are sufficient to support the conviction without regard to the evidence; that the language and actions of the defendant and the manner in which the language was used and the actions were done were necessarily within the personal knowledge of the judge, and that the specific charge of the manner of the defendant and specific finding and statement of the judge thereon required the rendering of the judgment that followed. We do not want to be understood as deciding that in ordinary cases something more is necessary than the statement of the facts upon the record and the findings of the court thereon to support a conviction of contempt committed in the presence of the court. In this case we think that the judgment is not supported by the record. Instead of relying upon the knowledge of

the court and inflicting summary punishment upon a contumacious attorney, the court directed the formality of a legal trial. It was stated from the bench that the matter was left in the hands of the county attorney, and the state called and examined numerous witnesses to prove, not only the fact of the use of the language alleged, but also definitely and specifically the manner and tone of the voice of the defendant and all of the surrounding circumstances and conditions, assuming the burden of proving in the ordinary way all of the matters alleged in the information. The findings of the court are borrowed literally from the information, and contain the most of the allegations of the information in the language and form in which the matters are charged. Outside of these formal findings there is no statement of the court in regard to the transactions that took place in the presence of the court. The findings are manifestly based upon the information and the evidence, and must be taken as reflecting the views of the court as to the facts established by the witnesses examined, and not from his own knowledge.

Among the witnesses examined for the state were the two bailiffs of the court, and the testimony of the witness Kirkendall, one of the bailiffs, fairly shows the evidence upon which the findings and conviction are based. This witness appears to be very observing and conscientious. He was questioned by the prosecution, and answered as follows: "Q. Was the language used by Mr. Connell, just quoted, spoken in a voice loud enough so that the people back in the court room would be able to hear it? A. I judge that any one in the court room could hear it. He did not say it in a very boisterous manner, but he said it so that any one in the court room might have heard it. I was sitting back there in my chair, and I heard it. Q. What was Mr. Connell's manner and demeanor, and what was the tone of his voice at the time he addressed the language quoted to the court? A. Well, I thought that he spoke in what I would consider a kind of natural tone

of voice for Mr. Connell. He talks very loud, but he spoke it in a kind of, that is, he finished it up, if I remember right, in a kind of half laughing manner, as though he had no confidence in bringing—" He was then interrupted, and, being told by the court to continue his answer, answered further as follows: "A. Well, he spoke it as though he thought it was useless to—he left the impression that he thought it would be useless to add any more law. He left the impression that he did not think it would carry any weight with it. That is the nearest I could give it. Q. What do you say, Mr. Kirkendall, as to whether the tone of voice used by Mr. Connell, when he employed that language, was respectful or disrespectful to the court? A. Well, now, that is hard for me to answer. If I was to use my own judgment, I would say that I did not suppose that Mr. Connell cared much for the court—respected the court a whole lot in that statement. Q. I will ask you to state whether the tone of his voice, when he used the language referred to, was sarcastic or otherwise? A. No; I don't know as it was. I thought it was a kind of natural tone of voice for Mr. Connell. Q. Have you stated, now, the manner in which his tone and conduct impressed you when he was using that language? A. I think I have." This related to the first and second counts in the information. As to the third and fourth counts in the information he was questioned, and answered as follows: "Q. Were you also present in the court room, Mr. Kirkendall, during the trial of the case of the State of Nebraska against Howell, when the defendant, William J. Connell, addressed the court, his honor, Judge Sutton, then presiding, in the following language: 'Now, your honor, I contend and insist that to exclude any witness called by the defense, simply because he has violated some order of the court, and the defendant himself is not a party to it, would be not only the rankest injustice, but would be error of the grossest character'? A. Yes, sir. Q. I will ask you to state what tone of voice Mr. Connell used when he employed the language quoted?

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A. Well, in that statement, I think he used a kind of animated tone of voice. Q. Could you say as to whether it was boisterous or not? A. Well, it was very loud. Q. Was it unusually loud? A. Yes, sir. Q. What would you say as to whether or not the language used by Mr. Connell toward the court was used in an insolent manner or otherwise? A. Well, I don't know as to that. I was off that distance. I could hear it plainly. I could not see his face. Q. What would you say as to whether it was in a disrespectful or respectful tone of voice? A. Well, it sounded to me as challenging the judge on excluding the witness. Well, I don't know how you want me to answer that, unless I can answer it in my own way. Q. Read the question. A. I heard the question. Q. What would you say, Mr. Kirkendall, as to whether the tone of voice was respectful or disrespectful? A. Well, it sounded to me, of course, disrespectful, for the reason that it sounded as if he was issuing a challenge to the judge for excluding the witness from the chair on account of being in the room during the trial."

There appears to be two statements of this witness that tended perhaps in some degree to support the allegations of the information. When asked the leading question by the state's counsel in regard to the language of the defendant, "Was it unusually loud?" he answered, "Yes, sir," and he says that "it sounded to me, of course, disrespectful." But the reason for this latter conclusion is derived, as appears from his answer, entirely from the language itself, and not from the manner in which it was used. If the witness had understood that the question as to excluding the testimony of the witness, Griffith, was still undetermined, and that the court might yet conclude to allow the evidence, and was listening to the argument for the purpose of determining the propriety of so doing, this witness undoubtedly would not have considered the language used as disrespectful. We cannot add to this opinion, already too long, by quoting further from the evidence of the state's witnesses. There was none more

convincing than the evidence of the witness Kirkendall. The defendant testified as a witness in his own behalf. He plainly and unequivocally explained the language used, the circumstances under which it was used, and his purpose and intention in using it. If his evidence is to be believed, it completely purges him of contempt.

The evidence fails to show beyond a reasonable doubt that the defendant was guilty of a wilful purpose to obstruct the proceedings of the court, or to insult or humiliate the judge either by boisterous behavior, by loud or sarcastic language, or by offensive and insulting demeanor.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

FRED CLEMENTS V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1907. No. 15,208.

1. **Criminal Law: REBUTTAL EVIDENCE: WITNESSES: INDORSEMENT ON INFORMATION.** Where it becomes necessary to call persons to testify in rebuttal of testimony introduced on behalf of an accused in his defense, and the evidence sought to be introduced is obviously and purely rebuttal in its nature, it may be given by witnesses whose names are not indorsed on the information.
2. **Homicide: EVIDENCE.** Where a witness for a defendant on trial for the crime of murder exhibits a hat to the jury, and by his evidence conveys the impression that certain holes therein made were made by a shot or shots fired at the defendant and his family by the deceased, it is competent for the state to rebut this impression by proving that the holes in the hat are not shot holes, although the hat itself has not been formally offered in evidence.
3. **Criminal Law: INSTRUCTIONS.** It is not error for the court to refuse to give an instruction requested by the defendant which does not contain a full and correct statement of the law applicable to the facts of the case as shown by the evidence.
4. ———: ———. The introduction of evidence tending to impeach a witness does not require the court to instruct the jury to totally disregard his evidence, and it is proper to refuse such instruction.

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5. ———: ———. It is not error for the court to refuse to instruct the jury that they should carefully scrutinize evidence of the prosecuting attorney because of the natural and unavoidable tendency of persons in his position to hear and remember only such matters as are favorable to the state.
6. ———: ———. An instruction that "a doubt produced by an undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt; and the juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to a possible state of facts differing from those established by the evidence. You are not at liberty to disbelieve as jurors, if, from all the evidence, you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered"—is not to be commended in all cases, but we cannot reverse a judgment of conviction solely for the giving of this instruction.
7. ———: ———. Error cannot be predicated upon a single clause or expression contained in an instruction, if the whole instruction, when read and considered together, correctly states the law applicable to the case.
8. ———: **NEW TRIAL.** Newly discovered evidence which is doubtful in its character, and is merely cumulative, is not a sufficient ground for a new trial.

ERROR to the district court for Sarpy county: **GEORGE A. DAY, JUDGE.** *Affirmed.*

B. S. Baker, James T. Begley and F. G. Hamer, for plaintiff in error.

W. T. Thompson, Attorney General, and Grant G. Martin, contra.

BARNES, J.

Fred Clements, who was the defendant in the district court, was charged with the killing of one Luke Goldie. He was convicted of the crime of murder in the second degree, and brings the case here for review.

We learn from the record that at the time of the killing, the defendant resided on the east side of Chicago street, which is an extension of Twenty-Seventh street of South

Omaha. The deceased resided on the west side of said street, about 50 feet south of the Clements residence, his lot being the second one south of the intersecting street, which is known as Grace street. Chicago street runs north and south. Grace street runs east and west. On the evening of the 3d day of August, 1906, the deceased returned to his home from South Omaha with a one-horse wagon loaded with bricks. If we are correct in our understanding of the evidence, the homes of the deceased and the defendant are located on a hill, or on the side of a hill. In driving up this hill with his load of bricks, the deceased stopped his horse to rest in front of the barn gate of the defendant. He then drove on to his own home. One Frank Gurness was assisting him, and on his arrival in his own yard the deceased heard his dog howling over at the defendant's place, and said to Gurness: "You unhitch the horse, and I will go and see about my dog." He then walked across the road to the defendant's fence. Several persons, among whom were two women, accompanied him. He found one of the Clements boys abusing his dog, and asked what he was doing. The defendant was near by with a gun in his hand, and his sons were also present. As soon as the deceased made the inquiry above quoted, the defendant gave the order to shoot, and immediately the firing began. The deceased, together with those who had accompanied him, rushed back toward his house, and, while running, he was struck in the leg by one of the bullets. About the time he arrived at the northeast corner of his home Gurness came from the horse and wagon, and assisted him into the house. He was also followed and assisted by his wife. Gurness took him through the kitchen into the front room, and about this time one Frank Gendra came from the Sofal house, which is located immediately south of the home of the deceased, entered the west door and passed through the kitchen into the front room. There he found Goldie and Gurness. The deceased showed him the wound in his leg; and, while Gendra was standing near the east window, the firing began a second time.

Several shots were fired, some of which passed through the window, breaking the glass and knocking it into Gendra's face. One of the shots struck the deceased in the side. He fell to the floor, and died the same night from the effect of this wound. The bullet which caused his death, and which was taken from his body, was shown to be from a 38-caliber rifle. The defendant was seen in the yard with his gun at or near the time the deceased received the fatal wound. The defense which seems to be most relied upon was an alibi.

The defendant's first contention is that the court erred in allowing one John McBride to testify against him, because the name of said McBride was not indorsed on the information. It appears that after the state had produced its evidence in chief and rested, the defendant, and other members of his family, testified in substance, that he and his son Henry had gotten into a buggy prior to the shooting, and driven out of the wagon gate, thence north about 450 feet to the county line road, thence west about 600 feet, thence south on Duncan street about 450 feet, thence east on Grace street to the wagon gate, from whence they started; that after they had reached a point about half way round the square above described, and while near the intersection of the county road and Duncan street, the shooting commenced at the Goldie and Clements residences and continued for some time, but was all over before they returned to the vicinity of the Goldie residence. It was also claimed that the first shots fired were from the Goldie residence toward the Clements house, and were thereafter interchanged from each of the two residences. To rebut this evidence the state called several witnesses, among whom was John McBride, and after the usual preliminary questions the prosecuting attorney asked him the following question: "Did you see the defendant, Fred Clements, during the shooting which occurred near the Goldie premises on the evening of August 3d last?" No objection was interposed to this question, and the witness answered: "Yes, sir." Then followed the question:

"Where was he?" This was objected to by the defendant, and was not answered. The prosecutor then asked the witness: "Did you see all of the shooting that occurred there on the evening of August 3d?" This was objected to by the defendant as being "incompetent, irrelevant and immaterial, and not proper rebuttal; the witness' name not being indorsed on the information, and leading and suggestive and not calling for the fact." The objection was sustained. The prosecutor then asked the following: "Mr. McBride, at any time during the shooting in the vicinity of the Goldie and Clements premises on the night of August 3d last, was the defendant, Fred Clements, on the county line road, or on the road running north and south in the vicinity of Shellhardt's, or at any time during that shooting was he on the road leading north and south between Shellhardt's and Bradford's, or between Bradford's and the clump of trees testified to, immediately east of Bradford's?" This was objected to as being incompetent, irrelevant and immaterial, and not proper rebuttal, and for the further reason that the witness' name was not on the information, and was leading, suggestive, and not calling for the fact. The objection was overruled, and the witness answered: "He was not." He was next asked: "At any time during the shooting in the vicinity of the Goldie and Clements premises, on the night of August 3d last, was the defendant, Fred Clements, in a buggy, upon any portion of the road we have described to you in the previous question?" To this question the same objection was interposed, which was overruled, and the witness answered, "No, sir."

In *Kelly v. State*, 51 Neb. 572, it was said: "Where it becomes necessary to call persons to testify in rebuttal of testimony introduced on behalf of an accused in his defense, or if it is rendered necessary by a material issue raised for the first time in the case by the evidence for the defense, and the evidence sought to be introduced on rebuttal is obviously and purely rebuttal in its nature, it may be given by witnesses whose names were not indorsed

on the information"—citing *Goldsby v. United States*, 160 U. S. 70, 16 Sup. Ct. Rep. 216; *State v. Parish*, 22 Ia. 284; *State v. Ruthven*, 58 Ia. 121; *State v. Huckins*, 23 Neb. 309, and *Fager v. State*, 49 Neb. 439. The record discloses that the defendant introduced evidence tending to establish an alibi. By such evidence he located himself in a buggy, driving over the road described by the question of the prosecutor, during the time the shooting in question was going on. That it was the province and the duty of the prosecuting attorney, if he could do so, to show on rebuttal that the defendant was not in the place mentioned and described in his evidence, there can be no doubt, and that this was the purpose in calling McBride as a witness. It appears that the court carefully excluded the evidence offered as to the whereabouts of the defendant, and confined the testimony of the witness to the declaration that the defendant was not on the road, or in the buggy, the place described by himself and his witnesses, at the time of the shooting in question. That this was purely and strictly rebuttal evidence there can be no doubt. If it be said that the competency of the witness to testify to the fact stated by him was doubtful because of his lack of knowledge, or, in other words, because a sufficient foundation had not been laid, the answer must be that it was not objected to for that reason. The defendant did not seek to question the competency of the evidence, or the foundation for its introduction, but relied upon the fact alone that the name of the witness was not indorsed on the information. So we are of opinion that the reception of this evidence was not reversible error.

Defendant's next assignment is that the court erred in permitting the prosecuting attorney to examine the witness John Briggs concerning a certain hat and its condition, over defendant's objections. It appears that one Carl Clements, a son of the defendant, while on the witness stand, was shown a hat by the defendant's counsel, and was asked if he wore that hat at the time of the shooting in question. He answered that he did. His attention was

then called to certain holes in it and its condition and he testified that the holes were shot into the hat at the time said shooting took place. He thus conveyed the impression to the jury that Goldie, or some one at his place, had shot at the defendant and his family. It was therefore proper to rebut Carl's evidence by showing that the holes in the hat were not shot holes, and this was what was done by the evidence of the witness Briggs.

The defendant further alleges that the trial court erred in refusing to give the jury the following instruction: "If you find that the Clementses were on or in the public road in front of their premises, and, without blame on their part, were fired upon by Luke Goldie, the Clementses or any one of them were justified in firing upon said Goldie even though they knew the result of their shooting would be to kill said Goldie." This instruction is not a correct statement of the law, and is not applicable to the facts of this case. The undisputed evidence shows that the deceased received his fatal wound after he had sought what he supposed was a place of safety, and while in his own house. So, even if the evidence showed that he or some partisan of his fired upon the Clementses, the defendant would not be justified in following the deceased to his own premises and shooting him after he had taken refuge under his own roof. Again, we find no convincing evidence in the record which shows that any shot or shots were fired at the defendant or his sons from the Goldie premises, or that any member of the Goldie party had a firearm of any kind in his or her possession.

It is also contended that the court erred in refusing to give instructions Nos. 4 and 5 requested by the defendant. These requests were on the point above mentioned, and in line with the instruction last above quoted. So this contention requires no further consideration.

Defendant alleges that the court erred in refusing to direct the jury to entirely disregard the testimony of Frank Gurness; and that the court erred in refusing to instruct the jury to totally disregard the testimony of a

witness that had knowingly sworn falsely. An examination of the record discloses that the court, on his own motion, gave an instruction which embodied the principle contained in the foregoing requests, but made it general in its nature, so as not to direct the attention of the jury to any particular part of the evidence, or the testimony of any particular witness. The instruction given was proper, and obviated the necessity for the special requests above mentioned.

Defendant further insists that the court erred in refusing to instruct the jury as follows: "You are instructed that the prosecuting attorney, whose duty it is to prosecute, in case he testifies as a witness, it would be your duty to scrutinize his testimony with more care and caution than an ordinary witness, because of the natural and unavoidable tendency of persons in like position to hear and remember only such matters as are favorable to the state." It appears that the only testimony given by the prosecuting attorney was directed to the identification of certain photographs of the Goldie and Clements premises. Hence the instruction tendered could serve no useful purpose. It may be further said that the prosecuting attorney is not in that class of persons to whom such an instruction is applicable.

In a separate brief filed by one of the defendant's counsel the twenty-second paragraph of the instructions given by the court, on his own motion, is vigorously assailed. This is a copy of the instruction defining a reasonable doubt, given and approved in *Willis v. State*, 43 Neb. 102; *Barney v. State*, 49 Neb. 515; *Davis v. State*, 51 Neb. 301; *Carrall v. State*, 53 Neb. 431; *Bartley v. State*, 53 Neb. 310; *Leisenberg v. State*, 60 Neb. 628; *Savary v. State*, 62 Neb. 166; *Nightingale v. State*, 62 Neb. 371, and *Schwartz v. State*, 65 Neb. 196. It is true, however, that this instruction was criticised by Judge HOLCOMB in *Bothwell v. State*, 71 Neb. 747, and by Judge SEDGWICK in *Lillie v. State*, 72 Neb. 228, and was also criticised by the writer of this opinion in a more recent case; but we have consistently held

that we will not reverse a conviction for the giving of this instruction alone, and we see no reason to depart from that rule in this case. Counsel also select expressions from two other instructions, and contend that they have the effect of shifting the burden of proof to the defendant. We have examined these assignments, and find that the instructions from which these expressions are selected, when taken as a whole, correctly state the law, and they are not subject to counsels' criticism.

Finally, it is contended that the court erred in refusing to grant the defendant a new trial on the ground of newly discovered evidence. It was alleged by the defendant, and shown by affidavit, that after the conclusion of the trial he for the first time discovered that Charles Norris, his daughter Marie and one Seater would testify to matters in support of his alibi. We have carefully examined the record, and find that none of the witnesses mentioned were able to testify conclusively or positively to the fact that the defendant was in the buggy, upon Twenty-Seventh street, the county line road, Duncan street, or Grace street, at the time of the shooting at the Goldie premises. Not one of these witnesses was able to say that he recognized the defendant as one of the occupants of the buggy. It is true that it is alleged that one or two of these witnesses would testify that they thought, at the time, the defendant was one of the occupants of the vehicle, but it appears that their only reason for such thought was the fact that they thought they recognized the rig as one belonging to the defendant. Again, it will be observed that this evidence possessed very little, if any, probative force, and, at most, it could only be said to be cumulative. Such evidence has never been held sufficient to furnish ground for a new trial.

In conclusion it may be said the record in this case presents such a state of facts that it is difficult to see how the jury could have arrived at any other verdict than the one returned by them. We are convinced that the defend-

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ant had a fair and impartial trial; in fact, he practically had his own way in presenting his theory of the defense. The record contains no reversible error, and therefore the judgment of the district court ought to be, and is,

AFFIRMED.

NATHAN CAMPBELL, APPELLANT, v. PETER J. YOUNGSON
ET AL., APPELLEES.*

FILED DECEMBER 18, 1907. No. 14,847.

1. **Judgment: COLLATERAL ATTACK.** Generally, where the determination of a matter has been committed to a particular administrative or legislative board or officer, and no appeal is provided for from such decision, its order or determination is final, and will not be subject to collateral attack.
2. **Injunction: DRAINS.** In a proceeding to establish a drainage ditch, if the county board possesses jurisdiction and authority to act in the premises, injunction will not lie on account of mere irregularities in the exercise of the power conferred.
3. **Statutes: CONSTRUCTION.** The doctrine of strict construction of statutes in derogation of common right is not to be so unreasonably extended as to hamper the execution of public enterprises designed for the general welfare, but at the same time property rights of individuals are not to be interfered with unless the power to do so is plainly conferred by the law.
4. **Drainage Districts: POWER TO CREATE.** The drainage act of 1881 (laws 1881, ch. 51) confers the power upon county authorities to create drainage districts for the purpose of draining "marsh or swamp lands" alone, and does not confer power to change the channel or divert the flow of running streams or natural surface water drains for the purpose of relieving the lands of riparian proprietors lower down the stream from periodical overflows in seasons of freshet.
5. ———: ———. The term "marsh or swamp lands," as used in said act, has a wider significance than the terms "marshes" or "swamps." The power is conferred by this act to drain lands which are not, strictly speaking, "marshes" or "swamps," but which are "marsh or swamp lands," meaning thereby lands which are so situated as to be rendered difficult or incapable of

* Rehearing allowed. See opinion, 82 Neb. ———.

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successful cultivation by reason of retaining in the soil or carrying on the surface an excessive quantity of water during certain portions of the year, even though at other times they may be as solid, dry and firm as lands in general.

6. **Statutes: CONSTRUCTION.** In considering an amendatory or substituted statute, it is proper to consider the provisions of the law which was repealed in connection with the law which takes its place, in order to ascertain the legislative intent, and all provisions of the original statute which are not carried forward into or repeated in the new law are annulled by the repealing statute.
7. ———: ———. In order to ascertain the proper meaning of a statute later as well as earlier legislation upon the same subject may be referred to. All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one.
8. **Drains: POWERS OF COUNTY BOARDS.** Under the facts set forth in the opinion, *held* that the county board of Kearney county is without jurisdiction to change the channel and divert the waters of the streams mentioned in the opinion from their natural flow for the purpose of preventing overflows, nor has it the authority to take part of the plaintiff's land against his will for the purpose of draining the lands embraced within the proposed drainage district.

APPEAL from the district court for Kearney county:
ED L. ADAMS, JUDGE. *Reversed. Decree for plaintiff.*

H. M. Sinclair and J. L. McPheeley, for appellant.

L. C. Paulson and C. P. Anderbery, contra.

Robert E. Evans and John V. Pearson, amici curiæ.

LETTON, J.

The plaintiff, who is the owner of a certain tract of land in Kearney county, brought this action against the defendants, Peter J. Youngson and others, as constituting the board of supervisors of Kearney county. The petition, in substance, alleges that a petition was presented to the county board of supervisors under the provisions of the drainage act passed and approved February 28, 1881, asking that a drainage ditch be constructed over and across

plaintiff's land; that the board procured the same to be surveyed, and has ordered its construction across his land, and intends to pay the cost of construction by special assessment made against the lands claimed to be benefited. He alleges it will take more than four acres of his land, and will greatly injure the remainder of the tract, and that no provision has been made to compensate him. He further alleges that there are no marsh or swamp lands contiguous to the proposed ditch, but that its only purpose is to arrest the natural flow of surface water and divert the same from its natural channel and cast it upon and across his land; that the statute confers no jurisdiction upon the board to take lands for the purpose of diverting surface water and alleges a number of other reasons for the claim that the board is without jurisdiction. He asks a perpetual injunction to restrain the threatened action. The answer, in substance, pleads that the board had jurisdiction in the premises; that the land proposed to be drained is marsh or swamp land, and that the object of the ditch is to drain the same and render it fit for agricultural purposes, to benefit the public roads, and to promote the health and general welfare of the inhabitants of the district. A trial was had, and a decree rendered dissolving the injunction and dismissing the action, and from this judgment the plaintiff appeals.

Generally, where the determination of a matter has been referred to the consideration of a particular administrative board or officer, and no appeal is provided for from such decision, its order or determination is final, and will not be subject to collateral attack. In *Andrews v. Lillian Irrigation District*, 66 Neb. 461, it was held that the question whether land will be benefited by an irrigation system and the creation of the irrigation district is exclusively for the county board, and is conclusive in a collateral proceeding. In *Dodge County v. Acom*, 61 Neb. 376, and in *Tyson v. Washington County*, 78 Neb. 211, the same principle was stated and upheld with reference to the determination of the county board that the construction and establish-

ment of a drainage ditch would be conducive to public health, convenience or welfare, and as to whether or not the route thereof is practicable. In the latter case it is said: "We think that no authority can be found holding that the policy or expediency of constructing any such public work, the exercise of discretion as to which is vested in any administrative board or official, can, in the absence of statutory permission, be interfered with or tried by the courts." Under this principle, therefore, and under the facts presented in this case, the only question necessary to determine is whether the county board possessed jurisdiction to order the proposed improvement. If it possessed the requisite authority, injunction will not lie on account of mere irregularities in the exercise of the power. The determining factor in this case with reference to this question is whether or not the lands proposed to be benefited by the improvement and to be assessed to pay the cost of the same are within and of the class, or are of the nature with reference to which power is conferred upon the county authorities to act, or, in other words, whether the board had jurisdiction of the subject matter. In order to determine this, a brief description of the locality where it is proposed to construct the ditch is necessary. "Whiskey slough" is a stream of water which flows eastwardly through a somewhat shallow and tortuous channel about two rods wide and three or four feet deep close to the northern boundary of Kearney county. Its general course is parallel with that of the Platte river, at a distance from the south bank thereof varying from a few rods to nearly a mile, it being farthest from the river at a point near the south line of plaintiff's land. The territory through which it runs its entire course is the nearly level bottom of the river valley, which is here several miles wide and which has a nearly uniform slope or inclination to the eastward of about seven feet to the mile. The volume of water within its banks rises and falls substantially as does the water in the river, the subsoil between the two streams being of a very porous or sandy nature, so that its flow is

usually governed largely by that of the water in the larger stream. The land lying to the southward of the river valley consists of rolling hills, cut up by hollows and ravines, which form natural drainage channels and drain the surface water caused by heavy rains and melting snows toward the river, but which are intercepted at this locality by the bed of Whiskey slough. The plaintiff owns the southwest quarter of section 23 in Blaine township, and, according to the map introduced in evidence, the south line of this tract of land is crossed by Whiskey slough no fewer than seven times in its winding flow toward the east. Near the southwest quarter of this land a ravine or natural drainage channel, having its head or rise in the high ground some seven or eight miles to the southwest, intersects the channel of the slough. This natural waterway or drainage channel known as "Dry creek" drains a large expanse of territory, and in times of heavy rains carries down and discharges at the point where it enters the stream a large volume of surface water, thereby causing the slough, at such times, to overflow its banks and to inundate the almost level lands upon either side, extending from below the mouth of Dry creek to the lower course of the slough. Counsel for the defendants in his brief describes the condition which the proposed improvement is designed to remedy, as follows: "During wet seasons, and especially so during the last four or five years, heavy rains would fill up the two sloughs, Whiskey slough and Dry creek, and, where they join, the slow, sluggish, sinuous and tortuous nature of Whiskey slough fails to properly conduct the waters coming from the two sloughs to the river. By virtue of these conditions, the water would overflow the banks of Whiskey slough and onto the lands adjacent. Because of the failure of Whiskey slough to convey the additional water from Dry creek, its own banks would overflow for a great distance back of its junction with Dry creek, the water being backed up over its banks and on the surrounding country. The land on both sides of Whiskey slough, being of a level nature, the fall being

seven feet to the mile or one-fourth inch to the rod, instead of receiving much needed assistance from Whiskey slough in conducting its large amount of surplus rain water into the river, it receives added burdens from the overflow of Whiskey slough. During four consecutive seasons the crops were totally destroyed for a distance of ten or twelve miles east and west along Whiskey slough. This entire territory became a swampy, marshy tract, full of swales and low places, with Whiskey slough, instead of draining it, doing the reverse, feeding it more and more. In this condition, the ground becomes unfit for cultivation when too wet, and, if it ever dries up, again becomes unfit because of its hardened condition."

This is the situation of the lands in question as placed in the light most favorable to the defendants' contention. There is evidence on the plaintiff's side of the case, however, tending to prove that much of the trouble that has occurred in later years has been caused by the careless and unskilful manner in which a section line road has been constructed in the locality, by which the channel of Whiskey slough has been blocked and obstructed at different points so as to hinder the free flow of surface water therein and to create ponds where none existed before. One witness testifies as follows: "The condition of things is this: Sometimes there is a freshet. The Whiskey slough, if it rains, itself, would carry off its own water, but when there is a freshet most of the water comes down out of the sand hills, and that runs into Whiskey slough. They undertook to build a road, and, instead of putting crossings and bridges in where the creek crosses the road, they filled it up on the level, and when the water comes down through Whiskey slough it couldn't pass.
* * * It could not have the natural course, and then they had a ditch two feet wide on one side and about a foot deep to carry the water out, and the other side of the road they scraped out there to help fill the road out. Now, as the road is, the water backs up, and if it was opened out and let the water through so that Whiskey slough

could have the natural course to carry off the water it would carry off all of the water." It will be seen that there is a decided conflict as to the actual condition of the lands in question.

The manner in which it is proposed to remedy the evils complained of is as follows: It is proposed to dig a ditch, beginning at a point in Dry Creek 120 rods south of Whiskey slough, sufficient in size and capacity to carry all of the waters of Dry creek and of the slough, and to extend this ditch northward across Whiskey slough and along the west side of plaintiff's land and other lands until it reaches another ravine draining into the Platte river. The object of this proposed construction is to change the channel and alter the course of Dry creek, and also of Whiskey slough, in such manner as to divert all of the waters of both streams from their natural channel so that, instead of discharging into the Platte river at the mouth of Whiskey slough, about nine miles from the point of diversion, they will discharge into the river at a point about one mile north of the intersection. The report of the commissioner who was appointed to view the proposed ditch is to the effect that no lands will be benefited thereby except such as lie to the eastward and at a lower level than the proposed ditch. It is apparent that the evil arises, not from the wet or swampy nature of the lands on Whiskey slough to the west of the mouth of Dry creek, as they are not benefited by the ditch, but from the sudden discharge of the waters of that creek into the channel of Whiskey slough at the point of intersection. As a matter of fact, the proposal is to create an artificial channel for and to divert therein the waters of the perennial stream, Whiskey slough, and the surface water at times flowing down the natural drainage channel known as "Dry creek."

Does the act contemplate or authorize the condemnation of private property for such purpose and the assessment of the cost thereof upon the land of the adjoining proprietors? It is an elementary principle that the right

to take the property of another *in invitum* must be clearly shown, and that a strict construction should be given statutes authorizing such a proceeding, such statutes being in derogation of common right. Black, Interpretation of Laws, p. 303. This doctrine is not to be unreasonably extended so as to hamper the execution of public enterprises designed for the general welfare, but, at the same time, property rights of individuals are not to be interfered with unless the power to do so is plainly conferred by the law. The act under which the authority is claimed was passed in 1881, and is entitled "An act to provide for draining marsh or swamp lands in the state of Nebraska, and to repeal an act entitled 'An act to drain marsh or swamp lands,' passed March 3, 1873, took effect June 1, 1873." Laws 1881, ch. 51. It is earnestly contended by the plaintiff that under the title of this act no authority can be conferred to drain lands other than those which are distinctively marshes or swamps and that the lands in the locality in question are not of that nature; hence that no jurisdiction is possessed by the county board to drain the same. From an examination of the testimony in this case it would appear that the lands which the commissioner reports would be benefited by the proposed ditch cannot be said to constitute a "swamp" or "marsh." We think, however, that it was not the intention of the legislature to confer power to drain "marshes" or "swamps" alone, but to drain "marsh or swamp lands," which is a term of wider significance, and which has been held by other courts to mean lands which, by reason of their wet or marshy nature, are incapable of successful cultivation. *San Francisco Sav. Union v. Irwin*, 28 Fed. 708. Land which, from its low and level character, may from excessive rainfalls retain at some seasons of the year sufficient water so that it is rendered incapable of cultivation may fall within the class of swamp lands, yet the same tract could hardly be said to form or be a "swamp." We find no difficulty therefore in holding that the power is conferred by this act to drain

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lands which are not "swamps" or "marshes," but which are "swamp lands," meaning thereby lands which are so situated as to be rendered difficult or incapable of successful cultivation by reason of retaining in the soil or carrying on the surface an excessive quantity of water during certain portions of the year, even though at other times they may be as solid, dry and firm as lands in general.

The question presented is whether the statute authorizes the compulsory taking of lands against the will of the owner in order to provide for the prevention of overflows. In construing an amendatory or substituted statute, it is necessary to consider the provisions of the former law which was repealed in connection with the law which takes its place, in order to ascertain the legislative intent, and all provisions of the original statute which are not carried forward into or repeated in the new law are effectually annulled by the repealing statute. *Ex parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. Rep. 396; *Goodno v. City of Oshkosh*, 31 Wis. 127; *Viterbo v. Friedlander*, 120 U. S. 707, 7 Sup. Ct. Rep. 962, 972. Section 1 of the act of 1873 (Gen. St. 1873, ch. 80), which was repealed by the law under consideration, provides: "When a majority of the resident owners of any marsh, swamp, watercourse, or overflowed land within this state shall wish to have a ditch or drain laid out for the purpose of draining any marsh, swamp, or overflowed land, or for the purpose of straightening or enlarging any watercourse, they may make application, * * * the commissioners shall proceed to lay out such ditch or drain, or to deepen, widen, or in any form enlarge any watercourse for the purpose of draining the lands embraced in such petition, if in their judgment such ditch, drain, or enlargement is demanded by, or will conduce to the public health or welfare." Section 2 provides: "Whenever application shall be made to the county commissioners of any county by a majority of the resident owners of any swamp, marsh, overflowed lands, or watercourse * * *

for the purpose of having any ditch, drain, or watercourse laid out," etc. It will be observed that this act provides for application by the owners of overflowed lands or of a watercourse, as well as owners of swamp or marsh lands, and the powers conferred upon the commissioners by the body of the act extended to the straightening or enlargement of a watercourse apparently with reference to the draining of lands contiguous to streams of surplus waters thrown upon them by overflow, as well as lands of the character of marsh or swamp lands. The act of 1881, under consideration, which repealed this act, confers power upon the county board to cause to be located, constructed, straightened, widened, altered or deepened any ditch, drain, or watercourse when the same is necessary to drain any lots, lands, public or corporate, road or railroad, and will be conducive to the public health, convenience and welfare. Under this act the petition for the improvement need only be signed by one or more owners of lots or lands which will be benefited, instead of a majority of the resident owners as the former act requires. It omits entirely any provision for the construction of a ditch or drain for the purpose of draining overflowed lands. It cannot be said that this was done by inadvertence, or that the meaning and intention of the present act is the same as that which was repealed. The former provided specifically for the drainage of overflowed lands. The present omits all reference thereto. If it is said that this act covers all lands, then the act is broader than the title; but we think the words "marsh and swamp lands" in the title must be read into and control the general words in the body of the act, and that the qualifying words in the title are as effective as if contained in the act itself.

In order to ascertain the proper meaning of a statute, we may refer to later as well as earlier legislation upon the same subject. All existing acts should be considered in considering a given act, and a subsequent statute may often aid in the interpretation of a prior one. 26 Am. &

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Eng. Ency. Law (2d ed.), 624, and cases cited in note two. An examination of the later course of legislation confirms us in our view that the act of 1881 does not confer power upon county boards to divert streams and change the course of natural drainage channels in order to prevent overflow. In 1905, and before the proceedings were begun, an act was passed and took effect, entitled "An act for the organization and government of drainage districts; for the reclamation and protection of swamp, *overflowed* or *submerged* lands," etc. (laws 1905, ch. 161); and, further, in 1907 another act was passed, entitled "An act to provide for drainage districts to drain wet land, and *land subject to overflow*, and any land which will be improved by drainage; to build dikes and levies; to construct, straighten, widen, deepen, or alter any ditch, drain or stream or watercourse; * * * to construct, enlarge, extend, improve or maintain any *system of control of surface water or running water*," etc. Laws 1907, ch. 153. It is apparent from these enactments that the legislature was of the opinion that further legislation was necessary in order to confer power upon county authorities to prevent overflows by controlling the course of natural water ways so as to prevent the discharge of surface or overflow waters upon low or level lands, or to alter or straighten any stream or watercourse, or to construct or maintain any system of control of surface water or running water, and that by these later enactments it undertook to confer powers over a subject not already embraced in existing laws.

The plaintiff argues that the title of the act of 1881 is too restricted to cover all the subjects contained therein, but, irrespective of the question whether the titles of the respective acts of 1873 and 1881 are sufficiently broad to embrace all of the powers conferred within the bodies of the respective acts, a question which has been already passed upon by this court in the case of *Dodge County v. Acom*, and *Tyson v. Washington County*, *supra*, we are satisfied that the power to change the channel of Dry

creek and Whiskey slough, to divert the waters of these watercourses from their natural flow, and to change their place of outlet, as proposed, is not conferred by the act under consideration, nor is the power conferred thereby to drain lands which are not of the character of swamp or marsh lands as defined in this opinion.

The action of the county board in the premises was without jurisdiction, and the plaintiff is entitled to a perpetual injunction as prayed for in his petition.

JUDGMENT ACCORDINGLY.

STATE, EX REL. JAMES L. CALDWELL, APPELLANT, V. LINCOLN STREET RAILWAY COMPANY ET AL., APPELLEES.*

FILED DECEMBER 18, 1907. No. 15,063.

1. **Street Railways: CHARTER.** The charter of a street railway company organized for the purpose of constructing a system of lines in a city of this state, under act of February 15, 1877 (laws 1877, p. 135), must fix the termini of the road, and state the street or streets through which it is proposed to construct and operate the same.
2. ———: **USE OF STREETS: SUBMISSION TO ELECTORS.** The consent of a majority of the electors of the city to the use and occupation of the streets over which the proposed road is to be constructed must be obtained before construction is commenced; such consent to be given or withheld at an election called for that purpose.
3. ———: ———. The consent of the electors to the occupation of all the streets of a city by a street railway company, where no termini are mentioned in the notice of the election, carries with it no right to the use of any street which is not used for the construction of the road within a reasonable time thereafter. To hold that such blanket consent, where no termini or route is submitted to the electors, confers on the company the right to the use and occupation of any of the streets which it might at any time thereafter select as best suited to its interest would be awarding to a private corporation a power which the people, by their constitution, have withheld from the legislature of the

* Motion to modify opinion overruled. See opinion, p. 352, *post*.

state and from the municipal authorities where the streets are located.

4. **Quo Warranto: PROCEEDINGS AGAINST CORPORATION.** An information in the nature of a *quo warranto* filed against a corporation by its corporate name admits the existence of the corporation. If the charge be that the corporation is exercising powers not given by its charter, the action proceeds against the corporation to oust it from the use of the usurped power; but, where it is claimed that corporate powers are being usurped by a body which has no corporate existence, then the action must be against the individuals who are usurping corporate rights.
5. **Estoppel: LACHES.** The courts, in a proper case, will apply the doctrine of laches to a case in which the state is a party plaintiff. The state, like individuals, may be estopped by its acts or laches, and should not be allowed to oust a corporation of its rights and franchises where, for a long series of years, it has stood silent and seen the corporation expend large sums in the acquisition of property and improvements made thereon under a claimed right so to do under its charter.
6. **Judgment: RES JUDICATA.** The city of Lincoln brought an action against a street car company to oust it from the possession of certain streets in which its tracks were laid, alleging that its only right in the streets was derived from the purchase of the property and franchise of another company that had obtained the consent of the electors of the city to the use of its streets for railway purposes, that such consent was not transferable, and that the tracks of the company were an obstruction in the streets and constituted a public nuisance. On demurrer to this petition judgment went in favor of the defendant, which judgment is still in full force and effect. *Held*, That if it were conceded that the city represented the state in such action, and that the state was bound by the judgment to the same extent as the city, still the force of the judgment as a bar or estoppel in a subsequent action brought by the state could extend no further than to define the rights of the company in the streets then occupied by its tracks, that being the only question litigated, the right of the company to the use of other streets not being in issue.

APPEAL from the district court for Lancaster county.
LINCOLN FROST, JUDGE. *Reversed with directions.*

F. M. Tyrrell, Charles O. Whedon and J. M. Stewart.
for appellant.

Clark & Allen, contra.

DUFFIE, C.

Section 1, art. XI^b of our present constitution, adopted in 1875, is as follows: "No corporation shall be created by special law, * * * but the legislature shall provide by general laws for the organization of all corporations hereafter to be created. All general laws passed pursuant to this section may be altered from time to time, or repealed." Section 2 of the same article is in the following words: "No such general law shall be passed by the legislature granting the right to construct and operate a street railroad within any city, town, or incorporated village, without first requiring the consent of a majority of the electors thereof." At the session of the legislature held in 1877 (laws 1877, p. 135) an act was passed relating to the formation of street railway companies. The act, so far as necessary to an understanding of this case, is as follows: Section 1. "Any number of persons may be associated and incorporated under the general laws of this state providing for the creation of corporations for the purpose of constructing and operating a street railroad within any of the cities of this state, upon procuring the consent of a majority of the electors of any such city as hereinafter provided." Section 2. "Every such corporation, previous to the commencement of any business except its own organization, must adopt articles of incorporation and have them recorded in the office of the county clerk of the county in which the city within which it is proposed to construct and operate such street railroad is situated, and must procure the consent of a majority of the electors of such city as herein provided." Section 3. "The articles of incorporation must fix the termini of such street railroad, and state the street or streets through which it is proposed to construct and operate the same." Section 4 provides for obtaining the consent of a majority of the electors of the city by submitting the question to the electors at an election to be held for that purpose, and requiring ten days' notice by publication, which notice shall

state the termini of such proposed street railroad, and the street or streets through which it is proposed to construct and operate the same. Section 5 provides for the holding of such election in the same manner and at the same places as the general city election, and that, if a majority of the votes cast shall be in favor of the construction and operation of such proposed street railroad, the council shall cause the city clerk to make out a certificate of the result, stating that the consent of a majority of the electors has been given to the construction and operation of such street railway, which certificate shall be delivered to the chief officer of the railroad company, who shall cause the same to be recorded in the office of the county clerk where the articles of association of such street railway company are recorded, and in the same book, and such certificate shall be *prima facie* evidence of the facts stated therein and thereupon such street railroad company *shall be authorized to proceed and construct and operate such street railroad, as described in its articles of association, or any portion thereof, subject to such rules and regulations as may be established by ordinances of the city.*

On March 9, 1885, articles of incorporation of the Lincoln Street Railway Company were filed and recorded in the office of the county clerk of Lancaster county, which articles provided for certain termini of the railway, and the streets through which it was proposed to construct the same. The streets mentioned in the articles are from First to Twenty-Seventh streets, both inclusive, running north and south through the city, and from A to W streets running east and west, and other streets, which, as we understand, included all the then established streets of the city. The articles also provided for termini of the company "at such other points within five miles of the corporate limits of the city of Lincoln as the company may see fit to build to." An election was thereafter held, the notice of which described the streets of the city through which it was proposed to construct the road as described in the articles of incorporation, but which omitted to give the termini of

the proposed road, and a certificate was duly issued to the street railway company certifying that a majority of the votes cast were in favor of the proposition. Some time in January, 1890, the Lincoln Electric Railway Company was incorporated and filed its articles in the office of the county clerk of Lancaster county. The third paragraph of these articles, after designating certain termini of the lines of the company within the corporate limits of the city, contains a clause providing for other termini "at such other points in the vicinity of Lincoln as it may be advisable to select for such termini lines," and in the same paragraph is a provision for constructing its tracks in all the streets of the city then established, running both east and west and north and south through the city. July 1, 1887, the Standard Street Railway Company was incorporated for the purpose of constructing a street railway in the city of Lincoln. The third article provides as follows: "The termini of the lines of such company are fixed at or near the several railway depots in the city of Lincoln, and at or near University Place, and at such other points in the city of Lincoln and vicinity for a radius of five miles outside the limits of said city of Lincoln as it may deem advisable to select." The streets through which it is proposed to construct its line of road are, as we understand, all the streets of the city then laid out or existing, running both north and south and east and west through the city. March 19, 1887, the Lincoln Rapid Transit Company was incorporated; the third paragraph of the articles providing for termini at the several railroad depots, at or near the intersection of Eleventh and P streets, at or near the intersection of Eleventh and N streets, at or near the intersection of Twelfth and N streets in said city, also in West Lincoln, and at the Nebraska Exposition Association grounds, at a point near the Wesleyan University place, Wyuka cemetery, the penitentiary, the hospital for the insane, and such other points in the vicinity of Lincoln as it may be deemed advisable to select

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for termini of lines. Said article further provides for the construction of tracks, branches and connecting lines over and along First, Second, Third, up to and including Thirty-Third street, and other named streets running north and south, and the streets running east and west through the city, which description includes, as we understand, all the streets of the city then laid out or in existence. Elections were held to obtain the consent of the electors to the construction of railways by each of the above named companies, the notice of such election reciting, in substance, the provisions of the aforementioned articles of incorporation relating to the streets over which it was proposed to construct street railways by the several companies above mentioned, except that the termini of the proposed roads were omitted, and certificates issued to the chief officers of the several companies showing that the proposition had been adopted by a majority of all the votes cast at the election.

By chapter 38, laws 1889, street railways were authorized to unite their roads by consolidation, purchase, sale, or by subscription to or purchase of capital stock, and to mortgage their railways and property for the construction, equipment and extension of their roads. Under the provisions of this act the Lincoln Street Railway Company and the other companies above named executed articles of consolidation at different dates during the year 1891, and thereby became merged in a single corporation which retained the name of Lincoln Street Railway Company; and thereafter the lines constructed by each of the above named corporations were operated by the Lincoln Street Railway Company formed by the merger and consolidation of the above named separate companies. In July, 1891, the Lincoln Street Railway Company executed and delivered to the New York Security & Trust Company a trust deed on its property and franchises to secure the payment of bonds in the sum of \$600,000 issued for the purpose of borrowing money to construct and equip its lines of street railway. About June, 1892, said railway company ex-

ecuted and delivered to the New York Guaranty & Indemnity Company a trust deed on its railway and franchises to secure bonds in the sum of \$800,000 issued for the purposes aforesaid. Default being made in the payment of the interest accruing on these bonds, the mortgagees commenced an action of foreclosure in the United States circuit court, and in July, 1897, a decree was entered in favor of the mortgagees finding that each of said mortgages was a valid lien on the railway and franchises of the Lincoln Street Railway Company, and directing the property and franchises of the company to be sold and the proceeds applied on the sum found due. A sale under this decree was had in December, 1897, at which Moses L. Scudder and William Belcher, alleged to be acting as the agents of the Lincoln Traction Company, bid in the property in their own names, and the master conducting the sale, acting under the directions of the court, made and delivered to Scudder and Belcher a deed conveying to them the railway and franchises of the Lincoln Street Railway Company; and thereafter Scudder and Belcher made and delivered to the defendant Lincoln Traction Company a deed conveying to it the railway property and franchises of said company. Thereafter, and about January 10, 1898, the defendant took possession of the railway and has from that time to the present continuously operated the same.

The Lincoln Traction Company was organized on December 15, 1897. There is no provision in its articles for the construction of any street railway in the city of Lincoln or elsewhere, the evident purpose of the corporation being to purchase the property and franchises of the Lincoln Street Railway Company. This appears from the third paragraph of its articles, which defines the general nature of its business to be the acquisition by gift, grant, purchase, lease or otherwise, at public or private sale, and to own, enjoy, maintain, control and operate all or any part of the property or property rights, franchises, easements, lots, lands, etc., now or hereafter in the possession

or ownership of a certain corporation known as the "Lincoln Street Railway Company," and it is under these articles and the conveyance to it of the property and franchises of the Lincoln Street Railway Company by Scudder and Belcher that it now claims the right to occupy the streets in the city of Lincoln, and to operate thereon the several lines of street railway of which it is in possession, and to extend its lines in and over any of the streets of the city at its pleasure.

The relator, as county attorney of the county of Lancaster, brought this action to oust the defendant from its occupancy of any and all streets in the city of Lincoln. In the information filed he alleges that the Lincoln Street Railway Company, without right, and without lawful authority therefor, and without first obtaining the consent of a majority of the electors of said city of Lincoln, assumed to construct, in and upon certain streets of the city, street railway tracks; and, without authority therefor, assumed to lay down, in and upon certain public streets, ties and rails, and to run and operate street cars, without having obtained any right, authority or franchise therefor from said city or the electors thereof. The information then recites the particular lines of street railway constructed by the Lincoln Street Railway Company and which are now being operated by the defendant, the Lincoln Traction Company. It is further recited that the Lincoln Street Railway Company claims the right to construct and operate said lines of street railway under an ordinance passed by the mayor and council of the city in 1885 and a pretended consent of a majority of the electors obtained at an election held in April, 1885, but it is alleged that no legal notice of such election was given. It is further stated that the Lincoln Street Railway Company operated its lines for a few years and then abandoned the same, when the Lincoln Traction Company, without right or authority, assumed the right to operate street cars and a line of street railway upon and over the streets of Lincoln and practically along the routes theretofore oc-

occupied by the Lincoln Street Railway Company. Reference is then made to the articles of incorporation of the Lincoln Traction Company, and its right to own or operate a street railway company assailed upon the grounds above named, and also for the reason that its articles of incorporation do not name any termini of any street railway which it proposed to construct or operate, or any streets of the city of Lincoln which it proposes to occupy or over which it intends to operate its cars. It is further stated that the Lincoln Traction Company is constructing additional lines for which no consent has been obtained from the electors of the city, and that it never has filed any map or plat showing the route or location of any proposed line.

The answer of the defendant, the Lincoln Traction Company, recites the organization of the several street railway companies heretofore described and the consent of the electors of the city to the construction of lines of street railway by said several corporations. It further alleges the consolidation and merging of these several corporations into one corporation known as the "Lincoln Street Railway Company"; the issue of bonds as heretofore recited; the foreclosure of the mortgages given to secure the payment of said bonds; a sale of the property and franchise of the Street Railway Company to Scudder and Belcher, who, it is alleged, were acting for and on behalf of the Lincoln Traction Company in making the purchase at the master's sale; the conveyance by Scudder and Belcher of the property so bid in by them to the Lincoln Traction Company, after which, it is alleged, said company took possession of the railway and franchises of the Lincoln Street Railway Company, and has from that time to the present continuously operated the street railway purchased, and exercised and used the franchise obtained thereby. For a further defense it is alleged that the Lincoln Street Railway Company used the franchise granted by its charter openly and notoriously for more than 21 years prior to the filing of the amended information in

this case, and that any action challenging the grant of the franchise is barred by lapse of time, and that the law will presume a grant. It is further stated that after its organization the state in many ways recognized and acquiesced in the grant of the franchise claimed by the company under its articles; that it has assessed and collected taxes for each year from 1885 to 1897 on the property and franchise of the corporation; and that the city of Lincoln, acting under authority of the state, levied and collected taxes against the corporation finally merged and consolidated into the Lincoln Street Railway Company. Laches is also charged against the state in the conduct of the case, in that the trial of the action had been delayed for eight years after its commencement, and that in the meantime taxes had been levied and collected against its property and franchise, and that it had issued and sold bonds to the extent of \$150,000 and expended large sums of money in the construction and equipment of its lines. It is also alleged that at the time the Lincoln Traction Company purchased the property and franchises of the Lincoln Street Railway Company an action was pending against the latter company in the district court for Lancaster county to enforce the payment of certain special taxes assessed against its property; that after the purchase the Lincoln Traction Company was made a party defendant to said action, and that the city, by a substituted petition filed therein, alleged that the defendant had acquired no franchise to construct and operate a street railway on any streets of the city of Lincoln; that it had acquired no right by its pretended purchase under the decree of the United States circuit court; and that it was wrongfully and unlawfully occupying the streets of the city and obstructing travel thereon; that the defendant answered to the merits in said action; that the issue raised was submitted to the court, which on March 12, 1902, gave judgment in favor of the defendant and against the city of Lincoln, and adjudged that the defendant had a valid franchise to operate a street railway in the streets of the city and was lawfully

occupying the streets under such franchise, and this judgment is pleaded in bar of this action. A subsequent action brought against the defendant by the city of Lincoln to oust it from its occupancy of the streets of the city, and in which judgment was given for the defendant, is also pleaded in bar of this action. The trial resulted in a judgment for the defendant, and the relator has brought this appeal.

The foregoing extended statement of facts and of the issues made by the pleadings seemed necessary to an understanding of our views of the rights of the respective parties. It will be noticed from the provisions of our constitution and the several statutes relating to street railways set forth in the above statement that two things are essential to the legal maintenance and operation of a street railway in any city of this state: First, a corporate organization whereby a franchise to operate a street railway is obtained; and, second, the consent of a majority of the electors of the city to the occupation of the streets with the necessary tracks and equipment for the operation of the road. The first requisite can be obtained only from the state by organization under the general incorporation law provided for those wishing such a franchise, the charter reciting, among other things, the termini of the proposed railway, and naming the route and street or streets through which it is proposed to construct and operate the same; and, second, the consent of the electors of the city to the use of the streets named, which consent must be given at an election held in the usual manner after ten days' notice. This consent of the electors, when legally given to a legal proposition submitted to them, constitutes, in our view, the grant of a right of way on and over the streets named in the articles of incorporation and in the notice for the election, and confers upon the railway company an easement in the street which is irrevocable after the company has, within a reasonable time, acted upon the permission given and constructed its lines of road.

It is insisted by the relator, and strenuously urged in

a brief filed by the city attorney, who was allowed to appear in the interests of the citizens of Lincoln, that the several propositions submitted on behalf of the several railway companies to occupy all the streets of the city with their tracks was not such a proposition as the constitution and statutes contemplate, and that the consent given was therefore void. Our views upon this question cannot be better expressed than in the words of Judge Lurton, found in *Mayor v. Africa*, 77 Fed. 501, where permission to enter upon the streets of the city had first to be obtained from the city council, and where the ordinance manifesting the consent of the council covered all or nearly all the streets of the city. The Judge said: "To say that the whole of the grant constitutes a route or system is absurd. The grant covers every street, and, if occupied, would result in a railroad upon the four sides of every city square. The city would be covered by a line of railroad having the system of a checkerboard, regardless of the public interest, and in defiance of the public necessity. No community would for a moment tolerate such an unnecessary and harmful obstruction of its streets, and no company could possibly contemplate such a multiplication of parallel lines, crossed at right angles at each cross street by another series of like parallel lines. The clear purpose of this ordinance was to enable the grantee to elect from time to time what streets it would occupy, and what new lines, or extensions of old ones, its interests as a private corporation would justify. To delegate this power to a street railroad company is wholly inadmissible, violates every principle of public policy, and has no sanction in law. The provisions of the statute which we have heretofore cited, providing that 'no one of the streets of said city shall be used by said company * * * until the consent of the city authorities has been first obtained and an ordinance shall have been passed prescribing the terms on which the same may be done,' is a clear implication that the city authorities shall know what streets the

proposed railroad is to occupy, and intelligently determine whether the public interests will thereby be subserved."

In the absence of a constitutional provision the control of the streets and public highways of the state is vested in the legislature, which may delegate to the municipal authorities therein the power of such control and regulation. This control is to be exercised in the public interest, and our people were so jealous of this right they made it a provision of the constitution that neither the legislature nor the municipal authorities should have authority to grant a right of way for street railways in any city or incorporated town. They reserve to the people of each municipality the authority to say upon what streets a street railway might be constructed, and this consent was to be given at an election in which the proposition was to be submitted. Of necessity this means that a specific grant is to be asked for, that a specific route must be designated, that a blanket grant to occupy any or all of the streets of the city was never intended or contemplated, for this would be granting to a private corporation the right to choose its own route, and to lay its track in any street of the city as its interest might dictate, thus vesting it with the very power which the people have denied to the legislature and the municipal authorities. It requires no argument to show that a blanket grant of this kind conferred upon a private corporation to exercise its own discretion in the choice of routes would be exercised in its own interest, regardless of the public welfare. The occupation of the public streets of the city by railway lines is a matter of public interest to be exercised for the public benefit, and is a matter that cannot be delegated to a private corporation to be used at its discretion, as advantage or injury to its own interest may require. The most that can be claimed from the permission obtained from the electors of the city of Lincoln by the several street railway companies is the right to enter upon such streets of the city, within a reasonable time after such permission was granted, as they thought best to occupy

with their lines of road. So far as these lines have been constructed we think the defendant may claim an easement over the streets occupied, but the blanket license under which the defendant claims the right to extend its lines or to go upon other streets must be denied.

As to the constructed lines, it would be manifestly unjust, not only to the defendant, but to the holders of its securities, to now oust it of rights and privileges which it and those through whom it takes title have been claiming and exercising for years with knowledge and acquiescence on the part of the state. The state, like individuals, may be estopped by its act, conduct, silence and acquiescence. *State v. Flint & P. M. R. Co.*, 89 Mich. 481. In *State v. School District*, 85 Minn. 230, it is said: "In cases where the right of a corporation to assert its corporate existence has been questioned because of some defect or irregularity in the proceedings for organization, it has frequently been held that the doctrine of estoppel is applicable, where there have been acts on the part of the state which in terms amount to a waiver. The conduct of a state may be such as to constitute a declaration that a forfeiture of corporate rights will not be insisted upon, and that the right to declare such forfeiture is waived. The authorities upon this are abundant." Cooley, in his work on Constitutional Limitations (5th ed.), 311, after stating the well-known rule that the corporate existence of a municipal corporation cannot be questioned by a private individual, and that the state only can raise that question by *quo warranto* or other direct proceedings, proceeds to say: "The state itself may justly be precluded, on the principle of estoppel, from raising such an objection, where there has been long acquiescence and recognition." It is a significant fact that, even after commencing the action, the state for eight years made no effort to bring it to a trial and allowed it to slumber upon the docket. In this condition of affairs it seems unconscionable to ask us to deny the defendant the right to operate its constructed lines, and as a consequence compel it to sell its property for what it may .

bring, or, if no sale can be effected, to make a scrap pile of its personal effects.

What we have said in relation to a blanket license to enter upon the streets of Lincoln arises from the fact that the charter of the companies mentioned did not attempt to fix termini covering all the streets of the city, and the electors had no notice of the termini of the different lines of road when the several elections were held. We are not attempting to determine the rights of a company under conditions different from what here appears. If the articles of incorporation of these several companies had fixed a terminus at the end of each street, and the notice of election had set forth such termini so that the voters understood that they were extending to the company the privilege of building along each street from one end to the other, it might be that a different rule would prevail. We are not now called on to pass upon the effect of such a franchise, and our decision rests wholly upon what appears in the record. We are induced to make these remarks because in *Mayor v. Africa, supra*, the court of appeals affirmed the right of the railway company to construct and operate its road upon the streets and between the termini which were specifically set forth in the ordinance passed by the city council. In the opinion it is said: "Without expressing any opinion upon the other objections urged by counsel for appellants, we are content to reverse the decree of the lower court upon the ground that the ordinance of 1876 was not a valid or effectual consent to the occupation of any street *other than those embraced by the route beginning at the intersection of Main and Gay streets and terminating at the junction of Broad and Jackson*. The termini and general course of that route are specifically described, and the requirement of the tenth section of the ordinance, that the track upon those streets shall be laid within a given time, is an effectual recognition of that line as a route specifically consented to by the municipality."

The state insists that the Lincoln Traction Company has no corporate capacity to own or operate a line of street

railway because its charter does not describe the termini of its lines or the streets in the city over which its road is to be operated, and, further, because its charter does not conform to the statute in providing for the construction as well as the operation of a street railway. We think the information filed by the state concludes it upon this question. Where it is sought to question the corporate existence of an alleged corporation—that is, where the franchise *to be* a corporation is intended to be drawn in question, the proceeding must be against the individuals who usurp such franchise. Where the information is filed against a defendant by its corporate name, charging a usurpation of corporate franchises, and process has issued and been served accordingly, and the defendant has appeared and pleaded in a corporate capacity, setting up its charter, it is not competent for the state to deny the corporate existence of the defendant. In *People v. Rensselaer & S. R. Co.*, 15 Wend. (N. Y.) 113, it was held that an information in the nature of a *quo warranto*, filed under the revised statutes of the state of New York against a corporation by a corporate name, admits the existence of the corporation or that it once had a legal existence. And in *State v. Cincinnati Gas Light & Coke Co.*, 18 Ohio St. 262, 286, it is said: "We are aware of no case in this country, in which a body, sued as a corporation, has been ousted of the franchise to be a corporation, on the ground that it never had a legal corporate existence." Where a corporation is exercising powers or privileges in excess of its charter, then it may be proceeded against as a corporation, and the court will oust it of the franchises which it is usurping in violation of its charter. But where, as here, it is claimed that it has no existence as a corporate body because not organized in accordance with our statute, the case must proceed against the individuals who are usurping corporate rights.

Relating to the claim of the defendant that its right to construct and operate a street railway in the city of Lincoln is *res judicata*, it may be conceded that this is the case

so far as its lines were completed and in operation when the decrees relied on were entered. There were two suits in the district court for Lancaster county in which it is claimed the question was raised by the city of Lincoln. One was an action to enjoin the Lincoln Traction Company from constructing or operating a street railway, on the ground that it was unlawfully and wrongfully occupying the streets of the city. The other was an action to enforce certain paving assessments levied against the property of the Lincoln Street Railway Company and constituent companies, in which the validity of the mortgages given by that company was attacked, as was also the title of the Lincoln Traction Company derived through a foreclosure of these mortgages. If we concede that the city represented the state in these actions, which is not at all clear still the judgments entered would operate as an estoppel only to the extent that the city, by its plea, questioned the right of the railway company to the use of its streets. As we understand the record, the question put in issue by the suit first mentioned was the right of the Lincoln Traction Company to occupy the streets of the city with the lines then in operation, and its right to extend these lines and to take possession of other streets was not in question and was not covered by the decree entered. The petition in that case does not charge that the Lincoln Traction Company claimed any right in any of the streets of the city not then occupied by its railway, and the only fact alleged in support of the claim that the company was a trespasser upon the streets occupied by its lines rests in an allegation that defendant's only right to occupy those streets arose from a transfer to it of the property and franchises of the Lincoln Street Railway Company, to whom it was then conceded the people had extended the right to construct a street railway, the claim of the city being that such license or privilege was personal to the Lincoln Street Railway Company, and that it could not be conveyed or transferred to another company. It is true that in the prayer for relief the court is asked to

enjoin the Lincoln Traction Company from occupying the streets of the city for the *construction*, operation or maintenance of any line of street railway; but nowhere in the charging part of the petition is it alleged that the Lincoln Traction Company is constructing, or claims the right to construct, additional lines of road from those then in operation; and the question of its right to occupy any street upon which a line was not then constructed was not made an issue in the case. The estoppel could not operate beyond the issue made and the question tried, and that question was whether the Lincoln Traction Company was obstructing the streets of the city and whether the lines then in operation were a nuisance because of a want of authority on the part of the Lincoln Traction Company to maintain and operate the same. We cannot discover that the right of the Lincoln Traction Company to extend its lines or to occupy additional streets was in question in the second case above referred to, and, as we now recognize the right of the company to own and operate its lines, so far as completed, a further discussion of these cases is not called for. The federal court, in the foreclosure proceedings above referred to, was not called upon, and did not in fact, pass upon the extent of the franchise of the Lincoln Street Railway Company, which was sold as a part of the mortgage security, nor was the question of the validity of its claim to occupy the streets of the city one which was then litigated. These questions are still pending for the decision of the courts, and we are not concluded thereon by any judgment heretofore entered.

Defendant further complains of the action of the trial court in allowing an amended petition to be filed raising the issue of the right of the Lincoln Traction Company to occupy any of the streets of the city. It is said that the original petition charged the company only with a failure to perform its duties and obligations as a corporation; that the suit was instituted and the case tried on the theory that a grant was made to the Lincoln Street Railway Company by reason of which it assumed certain obli-

gations to the public which it had failed to perform, and that the case was tried and determined upon that theory. It is earnestly insisted that this court, instead of passing upon the questions presented by the record, should confine its examination to a review of the case on the theory on which it is said it was tried and determined in the district court. It may be that the trial court, even under our liberal statute relating to the amendment of pleadings, was in error in allowing the amended information to be filed; but, however that may be, the question of the right of the defendant companies to occupy the streets of the city of Lincoln and to exercise their own discretion in selecting the route upon which they will construct additional lines of road is fairly raised by the pleadings, and this question has been thoroughly argued by the attorneys of the respective parties. In a case of such great public importance we do not think the state should be concluded by our strict adherence to the theory upon which the district court may have tried the case. No claim is made that the record does not contain all the material evidence which could be offered in support of the rights of the defendant company to own and operate the line of road in its possession or to further extend its lines. If it be conceded that the trial court did not proceed upon the same theory upon which the case has been presented to this court, we fail to see where a different case could be made for the defendants. In this condition of the case an affirmance of the decree would be a great injustice to the public, and remanding it for another trial could benefit neither of the parties.

There are other questions discussed in the briefs of counsel which we regard as unimportant in determining the rights of the parties. For the benefit of counsel we will say that they have all been considered, but their consideration has not in anywise changed our views as above set forth. Our conclusion is that the Lincoln Traction Company is the owner of the constructed lines of street railway of which it is now in possession, and that it has right and

authority to maintain and operate the same, that its purchase of the lines formerly owned by the Lincoln Street Railway Company does not invest it with right or power to extend its lines, or to take possession of streets, or parts of streets, not now occupied by its completed lines, and that such extensions cannot be made, except by proceeding as required by law to obtain an additional franchise for that purpose and the consent of the electors of the city to such extensions as it may desire to make and such new lines as it may propose to construct.

We recommend, therefore, that the cause be remanded to the district court, with directions to modify its decree in conformity with the views expressed in this opinion.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the cause is remanded to the district court, with directions to modify its decree in conformity with the views expressed above.

REVERSED

The following opinion on motion to modify former opinion was filed November 6, 1908. *Motion overruled:*

New Trial: PRACTICE IN SUPREME COURT. Rule 7 of this court allowing 40 days from the filing of the opinion or rendition of the judgment in the case within which to file a motion for rehearing supersedes the general rule as to judgments becoming final at the expiration of the term at which they are rendered. This applies only to judgments and opinions by the court in its appellate jurisdiction. In the exercise of its original jurisdiction the provisions of section 602 *et seq.* of the code apply.

PER CURIAM.

Since the filing of the opinion in this case on December 18, 1907, a number of motions have been filed. The questions raised thereby we think are of sufficient moment to require a written opinion in their determination.

The term at which the opinion was rendered adjourned *sine die* upon the 19th day of December, 1907. Upon the

27th day of January, 1908, and within the 40 days allowed by rule 7 of this court for the filing of a motion for rehearing, the Lincoln Traction Company, appellee, filed a motion praying for a modification of the opinion and judgment of the court. This motion was accompanied by a printed brief in support thereof. On June 4, 1908, a paper was filed by appellee purporting to dismiss and withdraw its motion to modify the opinion and judgment. On June 8, 1908, a motion to modify the opinion was filed by the relator and appellant, alleging that the opinion is indefinite and uncertain as to the extent and duration of the appellee's rights on the streets of the city, and asking that the opinion be modified so as to limit and define such rights, and that the cause be ordered reargued upon this question. On June 20, 1908, the appellee filed objections to the consideration of the appellant's motion to modify the opinion, on the grounds that the court had lost jurisdiction because the motion was not filed at the September, 1907, term in which judgment was rendered; that it was not filed within the 40 days allowed by rule 7 of this court for the filing of motions for rehearing; that the vacation or modification asked is within the prohibition of the fourteenth amendment to the constitution of the United States; and that, since the adjournment of the term at which the judgment was rendered, investments had been made in the stocks and bonds of the appellee on the faith that the judgment was final. Briefs were filed by the respective parties in support of their respective contentions.

All of these filings were made during the January, 1908, term of court, which adjourned while the motions were pending. At this, the September, 1908, term, the appellee filed a motion to strike the motion of relator and appellant to modify the opinion and judgment from the files for the foregoing reasons, and for the further reason that "the issue sought to be raised by the motion, to wit, the duration of the franchise of appellee is not within the pleadings, and the court has no power to adjudicate and determine

the same." We can scarcely credit that the appellee means to be taken seriously as to the first two reasons which it gives for its contention that we are without jurisdiction to consider the motion of the appellant to modify the opinion and judgment. From the first institution of this court it has been the practice to allow motions for rehearing to be filed within 40 days from the filing of the opinion or judgment in a case, without reference to whether or not the term had expired at which the opinion was handed down, except in cases brought under the original jurisdiction of this court, where, as we held in *State v. State Journal Company*, 77 Neb. 771, by virtue of the statute, the same rules apply with regard to opening judgments after the term has expired as in the district courts of the state. Counsel for appellee have themselves adopted this construction of the law, and acted upon it in this case, by filing a motion for the modification of the judgment, accompanied by a printed brief, after the term had expired at which the opinion was handed down. It is true that the practice of some appellate courts is to hold that judgments in appealed cases become final at the close of the term at which they are rendered, but this has never been the practice in this court. Such a ruling may often result in great injustice, since it is quite a frequent occurrence that a large number of opinions are handed down on or about the last day of the term, when it would be impossible to prepare or file motions for rehearing. This very case furnishes such an instance, since the opinion came down on the evening of the day before the final adjournment of the term. The provisions of rule 7 allowing 40 days to present a motion for rehearing suspends or supersedes the general rule as to judgments becoming final at the close of the term, and the provisions of the statute referred to are not applicable, except in cases brought under the original jurisdiction of the court. As said in *Elliott, Appellate Procedure*, sec. 551: "This conclusion rests upon the familiar principle that, where a motion or petition is filed which keeps the case open, the judgment is not a

final one." Until an order is entered disposing of the motion for rehearing or modification the case is not finally disposed of. We held in *Horton v. State*, 63 Neb. 34, that this court does not lose jurisdiction in appellate proceedings until after the mandate has been sent to the district court and action taken thereon, following *People v. Village of Nelliston*, 79 N. Y. 638, and we adhere to this view.

We are inclined to agree with the appellee's contention that the modification sought by the appellant is not within the issues raised by the pleadings. To quote from the appellee's brief: "The sole issue tendered by the pleadings is that the appellees have no franchise and are unlawfully occupying the streets. This is the gist of the action, and on this issue the judgment is conclusive. Obviously these pleadings do not tender the issue that the company is now lawfully occupying the street, but that at some time in the future, either an indefinite period, or a reasonable time, the right of occupancy will terminate." It was not the intention of the court to decide questions not within the issues presented by the pleadings. We are inclined to think that counsel for both appellant and appellee have read more in the opinion than was written by the court, and have extended its meaning by implication to an extent unwarranted by its language. The gist of the opinion, *ante*, p. 333, is contained in the concluding sentence, which is as follows: "Our conclusion is that the Lincoln Traction Company is the owner of the constructed lines of street railway of which it is now in possession, and that it has right and authority to maintain and operate the same; that its purchase of the lines formerly owned by the Lincoln Street Railway Company does not invest it with right or power to extend its lines, or to take possession of streets, or parts of streets, not now occupied by its completed lines, and that such extensions cannot be made, except by proceeding as required by law to obtain an additional franchise for that purpose and the consent of the electors of the city to such extensions as it desires to make and such new lines as it may propose to construct."

The action is *quo warranto*, and the questions whether or not, if the law so authorizes, the city may or may not by proper proceedings, recognizing and protecting or indemnifying the traction company for all its rights of property and equitable rights recognized by the opinion, seek to revoke the license by estoppel held by it, or as to the extent or duration of the equitable right of the railway company in the streets, are not within the issues in the case, were not considered by the court, and it would be manifestly improper, as contended by the appellee, for the court to express any opinion at this time upon these important questions. The state sought an ouster without regard to any equitable property rights of the appellee, and the court refused to allow such spoliation.

In this connection we think it well to say that there was no intention on the part of the court, by any language in the opinion, to depart from the principle announced in *Lincoln Street R. Co. v. City of Lincoln*, 61 Neb. 109, and *City of Lincoln v. Lincoln Street R. Co.*, 67 Neb. 469, and in *State v. Frost*, 78 Neb. 325, that, even if the ordinance submitting the questions to the voters had been valid and the consent of the electors had been obtained under the same, the street railway company would then have "derived no other or greater right than the privilege, license or permission to enter upon the streets for such purpose." Obviously no greater rights could be obtained by virtue of the laches of the city authorities than could have been had if the railway company was in possession of the streets under the provisions of a valid ordinance and the consent of the electors obtained thereunder.

The motion of the appellant to modify the opinion and judgment is

OVERRULED.

STATE, EX REL. JAMES L. CALDWELL, APPELLANT, V.
CITIZENS STREET RAILWAY COMPANY, APPELLEE.

FILED DECEMBER 18, 1907. No. 15,256.

1. **Street Railways: USE OF STREETS.** Where the electors of a city are invested with the power of extending to a street car company the right or privilege of entering on the streets of the city, an irregular exercise of such power will not, under all circumstances, be held void. Where the company, under the belief that it is authorized so to do under the vote of the electors, expends money in the construction of its line, considerations of public policy may require the court to protect it in the possession and use of its road so far as constructed and in operation, when its right to the use of the streets of the city is brought in question.
2. ———: ———: **LICENSE: ASSIGNMENT.** The right of a street car company to occupy the streets of a city with a line of street railway, granted by a vote of the electors, is, if nothing more, a license coupled with an interest, and such license is transferable.
3. **Cities: SALE OF PROPERTY.** A city of the class of the city of Lincoln may sell property acquired at a tax sale without first obtaining the approval of the electors of the city.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Reversed with directions.*

Flansburg & Williams and J. M. Stewart, for appellant.

Hall, Woods & Pound and Hainer & Smith, contra.

DUFFIE, C.

From the information filed by the state in this case the following facts appear: Three street railway companies, known as the "Capitol Heights Street Railway Company," the "Lincoln Rapid Transit Street Railway Company," and the "North Lincoln Street Railway Company," were duly organized under the laws of this state, and in the year 1887 ordinances were passed by the city council of the city of Lincoln calling elections for the purpose of

obtaining the consent of the electors of the city to the construction of lines of street railway in and over the streets of said city. So far as appears, neither the ordinances passed by the council nor the notices of the election gave any proposed termini of the lines proposed to be constructed or the route of any of said lines, but the ordinances and the notices described all the streets of the city as the streets upon which it was proposed to construct the several lines of street railway. At the several elections held, a majority vote was cast in favor of the proposition submitted, and certificates were duly issued to the said companies authorizing them to proceed and construct their several lines. The Capitol Heights Street Railway Company constructed and operated a line on Twelfth street from O street to N, from Twelfth to Eighteenth on N, from N to G on Eighteenth, on G from Eighteenth to Twenty-First, then north on Twenty-First to Randolph, and east on Randolph to Fortieth street. The North Lincoln Street Railway Company constructed and operated lines from Thirteenth and N streets, running north to T, west on T to Eleventh, north on Eleventh to Y, east on Y to Twelfth, and north on Twelfth to the city limits. The Capitol Heights Street Railway Company, some time in 1892, amended its articles, and the name of said corporation was changed to the Home Street Railway Company and was thereafter known by that name. After the building and construction of the above mentioned lines by the Lincoln Rapid Transit Railway Company and the North Lincoln Street Railway Company, the Home Street Railway Company, about the year 1892, purchased the physical property and right of way of said two companies, and by said purchase these roads became merged in the Home Street Railway Company of Lincoln, Nebraska. These lines continued to be operated by the Home Street Railway Company up to the year 1893, and during that time a large amount of general and special taxes were assessed against the property. In October, 1893, a suit was brought in the circuit court of the United States for the district of Nebraska by

the Fidelity Loan & Trust Company of Sioux City, Iowa, and a receiver was appointed to take charge of the property of the company, and afterwards the city of Lincoln, by leave of court, intervened in said action, and filed a cross-petition setting up its lien for taxes upon the property of the defendant company. Such proceedings were had in that case that in May, 1899, a decree was entered on the cross-bill filed by the city, in which it was found that franchises had been granted to the Lincoln Rapid Transit Street Railway Company, the North Lincoln Street Railway Company, and the Capitol Heights Street Railway Company, and that about July 1, 1893, the defendant the Home Street Railway Company, by purchase and conveyance, became the owner of all the properties, rights and franchises of said above named companies; that the taxes and special assessments were valid liens upon all the property, rights and franchises of said corporation; and it was ordered that said Home Street Railway Company pay or cause to be paid the sum of \$46,015.68, the amount of said taxes with interest thereon, within 20 days, and in default of such payment the properties and rights of defendant the Home Street Railway Company be sold to satisfy the decree. September 6, 1899, the property was sold and bid in by the city of Lincoln for the purpose of protecting its lien. The sale was confirmed, and in 1906 a second sale was held, and the franchise of said Home Street Railway Company was sold and bid in by the defendant the Citizens Street Railway Company, which in the meantime, and at some date in 1906, had been organized for the purpose of constructing, maintaining and operating a street railway in the city of Lincoln, Nebraska. Previous to the sale last mentioned the Citizens Street Railway Company had purchased from the city of Lincoln the physical property purchased by the city under the decree of the circuit court of the United States, and it has since reconstructed the lines theretofore operated by the Home Street Railway Company, and now, as we understand, claims the right to extend its lines into any or all the streets of the city. After

the appointment of a receiver for the Home Street Railway Company in 1893 none of the lines of that company were operated, and one claim of the state is that, because such lines were not operated from 1893 until 1906 when the defendant company went into possession, the Home Street Railway Company had forfeited its franchise. A demurrer to this information was interposed by the defendant company and sustained by the district court. The state not desiring to amend its information, judgment was entered dismissing the case, and the state has taken an appeal to this court.

Many of the questions raised by the record have been discussed and disposed of in *State v. Lincoln Street R. Co.*, *ante*, p. 333. Under the holding in that case, it is evident that no valid consent to enter upon the streets of the city of Lincoln was ever obtained from the electors by the several companies which afterwards became merged in the Home Street Railway Company. Neither the ordinance calling an election nor notice of the election mentioned any termini of the lines or the route of the proposed roads. The consent given was what we have heretofore termed a "blanket consent," which is of no avail when questioned by proper authority. It cannot be questioned, however, that, under our constitution and the statute relating to the formation of street railway companies, the electors of the city of Lincoln had the power to confer on such companies the right to construct and operate a street railway within the corporate limits of the city. In the exercise of this power the termini of the road and the route to be taken between such termini should be set forth in the proposition voted on. When this is done, the line of road is fixed and definite, and the right to construct this line is vested in the company and is beyond recall, as everything necessary to a valid and complete exercise of the power has been done. While the statute must be followed in all essential particulars in order that the consent of the electors to the occupation of the streets of the city by a railway company shall be valid and beyond recall, it does

not follow that an irregular exercise of the power possessed by the electors is absolutely void and wholly without force. The manner in which the question of the consent of the electors of the city was submitted was clearly irregular, and the affirmative vote cast thereon just as clearly conferred no power upon the railway companies to use the streets of the city beyond the time when that right should be questioned by some proper authority. But we are not prepared to say that, where the companies acted in good faith and expended their money in the construction of lines under a supposed right to occupy the streets, and this right was not questioned until the bringing of the present action, they or those claiming under them should be ousted from the possession of such streets as are now occupied by their lines, and their property rendered worthless. Under the circumstances of this case, we do not think it would be a wholesome public policy to hold that, because of the irregularity which occurred in granting the right which the people had power to confer, such irregularity renders all proceedings under the vote void and of no effect.

Regarding the claim of an abandonment of its franchise by nonuser, the authorities are clear that, to warrant a court in basing a decree upon that ground, the abandonment must be a clear, unequivocal and decisive act of the party showing a determination not to use or claim the benefit of its franchise. *Citizens Street R. Co. v. City of Memphis*, 53 Fed. 715.

It is also claimed by the state that the city of Lincoln did not acquire the franchise or consent of the electors held by the Home Street Railway Company by the foreclosure and sale in the federal court. We think the rule quite well established that a franchise to be a corporation is separate and distinct from a franchise as a corporation to maintain and operate a railway. The latter may be mortgaged without the former and passes to a purchaser at a foreclosure sale. *Morgan v. Louisiana*, 93 U. S. 217. The consent of the electors to the occupation of the streets of

the city, if a mere license, was a license coupled with an interest, and such licenses, it is well settled, are assignable. *Sawyer v. Wilson*, 61 Me. 529; *Wiseman v. Eastman*, 21 Wash. 163; *Heflin v. Bingham*, 56 Ala. 566.

It is further claimed that the city of Lincoln had no authority to sell and convey to the defendant the property of the Home Street Railway Company which it had purchased at foreclosure sale. This objection is fully met by the provisions of subdivision IV, sec. 9, art. I, ch. 13, Comp. St. 1905, defining the powers of a city of the class of the city of Lincoln. It reads as follows: "To sell and convey real or personal property owned by the city, and make such orders respecting the same as shall be deemed conducive to the interests of the city; but shall not have power to sell any real estate of the city, except such real estate as may be purchased upon sale for general or special taxes or assessments, unless authorized so to do by a vote of the majority of the electors of such city at a general or special election therefor."

Upon the record before us, we are of opinion that the Citizens Street Railway Company is entitled to the use of the streets now occupied by it for street railway purposes so far as its lines are completed and in operation, that it has no right to extend its lines without further authority from the electors of the city, that the decree of the district court should be reversed and the cause remanded, with directions to enter a decree in conformity with the views herein expressed.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded, with directions to enter a decree in conformity with the views above expressed.

REVERSED.

AUGUST GEBHARDT V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1907. No. 15,149.

1. **Criminal Law: REVIEW.** A judgment in a misdemeanor case rendered upon conflicting evidence will not be reversed simply because the appellate court receives a different impression of the evidence than did the jury and trial court, but such judgment will be upheld unless we can say it is clearly wrong.
2. ———: ———. The case was submitted to the jury on Friday. The next day it was announced that there was a chance for an agreement. The judge then told the jury that he would soon leave and would not be back until Monday evening, and authorized them to separate only in the event they reached a verdict when the judge was absent, and to return a sealed verdict Monday evening. Three hours later, and before the adjournment of the court, the jury returned its verdict. *Held*, That the verdict should not be set aside.
3. **Instructions examined, and held without error.**

ERROR to the district court for Greeley county: JAMES R. HANNA, JUDGE. *Affirmed*.

G. W. Scott and J. R. Swain, for plaintiff in error.

W. T. Thompson, Attorney General, and Grant G. Martin, *contra*.

EPPELSON, C.

Defendant, Gebhardt, was convicted of an assault and battery, and seeks a reversal upon three grounds: (1) The evidence is insufficient to sustain the verdict; (2) the court erred in making certain remarks to the jurors upon their return to the court room after deliberating several hours; (3) the court erred in giving an instruction upon its own motion. We shall consider the assigned errors in the order named.

1. John Adamie and his wife lived upon a farm in Greeley county. In July, 1905, water had formed a pond in the road near their residence, and Mrs. Adamie took

a spade and cleaned out a ditch along the road, thereby causing the water to flow upon defendant's land. While thus engaged, defendant drove along in a buggy, and, according to Mrs. Adamie's testimony, began to curse her and apply vile epithets. She came through the water toward defendant to a point where she could see her husband and call to him. While doing so, she passed close to the buggy and defendant struck her two or three times with his whip. After he struck her she struck at him with the spade which she held in her hand. Defendant drove on. Mrs. Adamie's testimony was flatly contradicted by defendant, who swore that she assaulted him with the spade, and that he used the whip to protect himself. The ten-year-old daughter of the prosecuting witness was present, and was called as a witness to corroborate her mother. She testified that defendant struck her mother first, and that her mother struck defendant's buggy with the spade after she had been assaulted. The little girl, however, corroborated defendant when she said that her mother jumped across the water and was going to hit him, and he hit her right across the neck. There was a sharp conflict in the testimony; and, while Mrs. Adamie's version of the affair was contradicted by several witnesses, we cannot say that the verdict entirely lacks evidence to support it. If Mrs. Adamie told the truth, and the jury found that she did, there was sufficient evidence to justify a verdict of guilty of assault and battery. A judgment in a misdemeanor case rendered upon conflicting evidence will not be reversed simply because the appellate court receives a different impression of the testimony than did the jury or trial court. Such judgment will not be reversed unless we can say it is clearly wrong. *Everson v. State*, 4 Neb. (Unof.) 109.

2. The case was submitted to the jury some time Friday. The next day the jury were brought into court, and were told by the judge that he would soon leave and would not be back until 7:30 P. M. Monday, and authorized them to separate in the event they reached a verdict when the

court was absent, directing that in that event to return the verdict sealed Monday evening. Before receiving these directions, the jury told the court that there was a chance of an agreement. Three hours later, and before the adjournment of the court, the jury returned their verdict. Under the court's instructions it is contended that the jury would have been required to remain together until Monday evening in charge of the bailiff had they not agreed. For this reason, defendant argues that the jury were coerced. No objection was made to the order of the court, and no exception taken to his ruling. However, we have examined the question for the reason that the coercing of a jury would be a flagrant injustice. The record shows that prior to the order of the court the jury announced that there was a chance for an agreement. Thereafter they continued their deliberations for three hours. With rare exceptions, Nebraska jurors heed their obligation, and do not permit the dread of difficult tasks to swerve them from the line of duty. On the face of this record it does not appear that the instruction complained of was objectionable or influenced the decision of the jury. A very similar case is *Erwin v. Hamilton*, 50 How. Pr. (N. Y.) 32, wherein the verdict was permitted to stand.

3. The court told the jury: "It is your duty as jurors to give this case a fair, intelligent and dispassionate consideration, and, if you find the defendant guilty, convict him; but, if under the evidence and the law as contained in these instructions you have a reasonable doubt of the defendant's guilt, you should not hesitate to find him not guilty." Defendant contends that the portion, "if you find the defendant guilty, convict him," allowed the jury to "enter the field of conjecture, or wander outside of the evidence." While we may not approve the form of the instruction, we cannot say that defendant was prejudiced thereby. Instructions should be read together, and, when the instruction complained of is read in connection with others given, we find that the jury were properly confined to the evidence.

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An affirmance of the judgment is recommended.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHARLES A. CORLISS, APPELLEE, V. PLANO MANUFACTURING
COMPANY, APPELLANT.

FILED DECEMBER 18, 1907. No. 14,848.

Exemptions: PLEADING. Under section 531f of the code, in an action by a wage-earner against a person assuming to be his creditor, who has by garnishment proceedings in a foreign jurisdiction obtained wages earned within 60 days previous to the garnishment, it is necessary to allege that the wage-earner was a resident of the state of Nebraska and entitled to the wages exempt at the time of the garnishment.

APPEAL from the district court for Antelope county:
JOHN F. BOYD, JUDGE. *Reversed.*

George W. Cooper and Mapes & Hazen, for appellant.

E. D. Kilbourn, contra.

Good, C.

A full understanding of the points decided requires us to set out the plaintiff's petition in full: "Now comes the plaintiff, and for his cause of action against the defendant alleges: (1) That the defendant is a corporation duly organized and existing under and by virtue of the laws of the state of Illinois, and doing business in Nebraska. (2) That the plaintiff is a resident of Antelope county, Nebraska, and the head of a family, and an employee of the Northwestern Railway Company, a corporation engaged in interstate commerce. (3) That the defendant herein,

claiming to have some demand against the plaintiff, did on or about the 20th day of April, 1903, commence an action in the state of Iowa against the plaintiff and on the said pretended demand, and did, on or about the date of commencing the said suit, garnish and attach the wages due the plaintiff from the said railway company, for the purpose of evading the attachment and garnishment laws of Nebraska, and contrary to and in violation of chapter 25 of the laws of 1889 of Nebraska. (4) That the wages garnished and attached as aforesaid were exempt to plaintiff, and earned within 60 days prior to the commencement of said suit and garnishment. (5) That the amount of money garnished as aforesaid is the sum of \$61.50; that the plaintiff's actual expenses and damages incurred on account of the said proceedings against him amount to the sum of \$10, and an attorney's fee of \$100, which is a reasonable attorney's fee in this case. (6) Plaintiff is not now, and never was, indebted to defendant in any sum whatever, and said suit was commenced for the purpose of extorting money from this plaintiff. (7) Plaintiff therefore prays judgment against the defendant for said several sums of money, amounting in all to the sum of \$171.50, with interest on the sum of \$61.50 from the date of said garnishment, and with costs of this suit." The statute under which this action is brought is in the following words: "That it be, and is hereby declared, unlawful for any creditor of, or other holder of any evidence of debt, book account, or claim of any name or nature against any laborer, servant, clerk, or other employee of any corporation, firm, or individual, in this state, for the purpose below stated, to sell, assign, transfer, or by any means dispose of any such claim, book account, bill, or debt of any name or nature whatever, to any person or persons, firm, corporation, or institution, or to institute in this state or elsewhere, or prosecute any suit or action for any such claim or debt against any such laborer, servant, clerk, or employee by any process seeking to seize, attach, or garnish the wages of such person or persons

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earned within sixty days prior to the commencement of such proceeding, for the purpose of avoiding the effect of the laws of the state of Nebraska concerning exemptions." Code, sec. 531c. Prior to any evidence being introduced the defendant entered a demurrer *ore tenus* to the plaintiff's petition, alleging, as a ground, that it failed to state a cause of action. The demurrer was overruled, and, on a trial to the court, judgment was given for the plaintiff for the sum of \$72.50 damages and \$100 attorneys' fees and costs of suit. Defendant's motion for a new trial was overruled, and it has brought the record to this court on appeal.

A careful consideration of the statute discloses that it was the purpose of the legislature in enacting the statute to protect laborers, servants, clerks and employees in this state from having their earnings seized by creditors, or those assuming to be creditors, if earned within 60 days. The persons to be protected are the servants, clerks and employees *in this state*. The wages to be protected are the earnings for the past 60 days. An examination of the petition does not disclose that the plaintiff was a resident of the state at the time that his wages were seized under the garnishment proceedings. If he was not a resident of this state at the time, he was not entitled to his wages exempt under the laws of this state. For aught that appears in the petition, he may have been a nonresident of the state at the time of the garnishment proceedings and when the wages were seized, and may have been entirely without any right of exemption under the statutes of Nebraska. Under these circumstances, he has not shown by his petition that he was within the protection of the statute. The petition, not showing that the plaintiff was a resident of the state at the time the wages were garnished, is fatally defective. It therefore follows that the judgment of the district court is wrong and should be reversed.

For the reasons given, we recommend that the judgment of the district court be reversed and the cause remanded

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for a new trial, with leave to the plaintiff to amend his petition if he so desires.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial, with leave to the plaintiff to amend his petition, if he so desires.

REVERSED.

WILLIAM A. LAMSON, APPELLEE, V. VILLAGE OF ELM CREEK
ET AL., APPELLANTS.

FILED DECEMBER 18, 1907. No. 14,998.

Deed construed, and held to convey the land in dispute.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

H. M. Sinclair and J. M. Easterling, for appellants.

N. P. McDonald, contra.

GOOD, C.

Appellee, Lamson, brought this action against the village of Elm Creek to quiet title to a tract of land lying in said village. Defendant answered and denied plaintiff's title. George Arendt intervened and claimed title in himself as devisee of Catherine Arendt, deceased. The district court found for plaintiff and entered a decree quieting his title. Defendant and intervener appeal. Lamson's title depends upon a deed executed by Catherine Arendt to one Potter, from whom, by mesne conveyances, Lamson claims title. The question is: Did the description in the deed from Mrs. Arendt to Potter cover the land in dispute?

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In order to understand the situation, a statement of the facts, which are admitted, is necessary. Tyler street runs north and south through the village of Elm Creek. Block 1 of Arendt's Second addition lies west of Tyler street, but does not abut upon it. There is an alley running east and west through said block. East of the south half of said block 1, and between it and Tyler street, there is a strip of land 11 feet wide at the alley on the north, and 34 feet and 8 inches wide on the south. This is the strip of land in controversy. When Arendt's Second addition was platted, there was shown on the plat a street immediately east of block 1, which was designated as "Second street." It was never in fact used or traveled as it was platted, and was abandoned prior to the organization of Elm Creek into a village, and Tyler street, a little to the east of Second street, was opened. It was this change in the streets that left the strip that had formed a part of Second street, as platted, between said block 1 and Tyler street. The south half of block 1 had been subdivided into eight lots and one triangular tract. The eight lots were numbered from one to eight, commencing on the west, and were known as "Bond's subdivision," and the triangular tract formed the easternmost portion of the south half of said block. The triangular tract was 23 feet wide on the north, where it abutted on the alley, and narrowed to a point at the southeast corner of the block. This tract and the one in controversy lie adjacent to each other, and the two joined together form a tract 34 feet and 8 inches wide, extending from the south boundary of the block to the alley on the north.

The deed from Mrs. Arendt to Potter was made November 26, 1888. At that time Mrs. Arendt was the owner of the triangular tract in block 1 and the strip in dispute between it and Tyler street. Potter did not own any other real estate in the south half of the block. Prior to the date of the deed to Potter a sidewalk had been built adjacent to the south and east boundaries of the disputed strip. Lamson owned lot 8, and had a store thereon, and

after he acquired title to the land conveyed to Potter used a part of both the triangular strip and the strip in dispute for the storing of barbed wire and agricultural implements, and erected for rent on the north end of both strips a blacksmith's shop adjacent to the alley. The village moved its jail upon the disputed strip in 1897. It does not appear that it had permission from any one to do so, nor does it appear that any objection was made either by Mrs. Arendt or Lamson. Mrs. Arendt lived in Elm Creek until her demise in 1905. It does not appear that she asserted any claim of ownership to the disputed tract after her deed to Potter 17 years before her death. While Second street was abandoned and Tyler street opened as early as 1886, no formal action was taken by the village until 1897, when it passed an ordinance attempting to vacate Second street. It is not contended that this amounted to anything more than a formal ratification of what had actually taken place long previous.

This brings us to a consideration of the description in the deed from Mrs. Arendt to Potter. It is in the following language: "All that fraction of land lying east of lot eight (8) and south of the alley in Bond's subdivision in block one (1) of Arendt's Second addition to the town of Elm Creek, as platted and recorded in the clerk's office of Buffalo county, Nebraska, and extending east to the street now known as Tyler street." Appellants contend that this description does not cover the strip in controversy, and contend that the language used limits the land conveyed to that which is in block 1. They contend that the use of the word "fraction" at the beginning of the description shows an intention and purpose to convey only a fraction of the block, and therefore not to convey anything outside of the block. They also contend that the latter portion of the description, "and extending east to the street now known as Tyler street," shows an intention to convey the land to Second street, which was always commonly called Tyler street. While these arguments are plausible, we think that, under the circumstances, the lan-

guage will not bear the construction contended for by the appellants. It must be borne in mind that at the time of the conveyance to Potter Mrs. Arendt owned a tract of land 34 feet and 8 inches wide and 131 feet long. In the absence of strong reason for so doing, it does not seem probable that she would so divide this strip as to leave her remaining a wedge-shaped piece 11 feet wide at one end and 34 feet wide at the other. Nor can we conceive of any reason why Potter should desire to buy the triangular piece within block 1, which appellants contend he took by his deed. If appellants' contention is good, then Potter was buying a tract of land 23 feet wide on the alley, and narrowing to a point at the southeast corner of the block, without any outlet upon the street at all, and where he did not own any land adjacent to it in connection with which he could use such a strip. We think that a careful examination of the description shows that it was not the intention to limit the land described to that within the block, but that the language in the description, "in block one (1) of Arendt's Second addition to the town of Elm Creek, as platted and recorded in the clerk's office of Buffalo county, Nebraska," was used for the purpose of identifying the west and north boundaries of the tract conveyed. The west boundary was the east line of lot eight in said block. The north line was the alley in said block. Taking this view of the description, then the latter part of the description, "and extending east to the street now known as Tyler street," becomes plain and its purpose is apparent to convey the entire strip of land which is bounded on the west by the east line of lot eight, on the north by the alley in said block, and on the east by Tyler street. The fact that Mrs. Arendt resided in the village 17 years after her deed was executed to Potter and never asserted any claim of ownership to the disputed tract, in view of the fact that two buildings had been placed thereon and the tract was being used by Potter's grantees, would indicate very strongly that she did not claim any interest in the land, and that she understood that by her deed she had

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conveyed the tract in dispute to Potter. It appears to us that no other construction could give any effect to the language in the latter portion of the description, to wit: "And extending east to the street now known as Tyler street." It seems clear and evident to us that this was the intention of the parties, and that the judgment of the district court is right.

We therefore recommend that the judgment of the district court be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WILLIAM E. MCJUNKIN, APPELLANT, v. PLACEK & FITL,
APPELLEE.

FILED DECEMBER 18, 1907. No. 15,020.

Partnership, Action by: PLEADING. To authorize a copartnership to maintain an action in the partnership name, it is necessary for it to set forth in the pleadings in some manner that it was formed for the purpose of carrying on trade or business or for the purpose of holding property in this state.

APPEAL from the district court for Saline county: LESLIE E. HURD, JUDGE. *Reversed.*

Lafe Burnett and J. H. Broady, for appellant.

J. H. Grimm & Son, contra.

GOOD, C.

Placek & Fitl commenced this action in justice court to recover on an account. The defendant, by motion and objection, properly raised the question that plaintiff had not legal capacity to sue. His motion and objection were overruled and judgment was rendered for the plaintiff.

Defendant took the case on error to the district court, where the ruling of the justice court was sustained and the petition in error dismissed. Defendant appeals to this court.

The only question for consideration is: Did the record disclose that plaintiff had capacity to maintain the action? Plaintiff's bill of particulars was entitled as follows: "Placek & Fitl, a firm composed of Mike Placek and James Fitl, Plaintiffs, William McJunkin, Defendant." There is no allegation or reference in the bill of particulars as to the organization, business or character of the plaintiff. The action is prosecuted in the name of a copartnership. Under the common law this was not permissible. The rule of the common law has been abrogated in this state by section 24 of the code, which permits a partnership to sue and be sued in its partnership name. This court has held, in *Burlington & M. R. R. Co. v. Dick & Son*, 7 Neb. 242, that the statute, being in derogation of the common law, should be strictly construed. A strict construction of the statute requires the plaintiff, when it is a partnership, to set forth in the pleadings the facts which would show that it comes within the provisions of the statute. Under this section of the statute it is necessary that the pleadings should in some way disclose that the copartnership was formed for the purpose of carrying on trade or business or for the purpose of holding property in this state. The bill of particulars is silent in this respect. It fails to show that it was formed for the purpose of carrying on trade or business or for the purpose of holding property in this state. It therefore fails to disclose that the partnership is authorized to maintain the action. The construction of this statute has been before this court on a number of occasions, and the views herein expressed find support in the following cases: *Burlington & M. R. R. Co. v. Dick & Son*, *supra*; *Jansen & Co. v. Mundt*, 20 Neb. 320; *Weisz & Mall Co. v. Darcy*, 28 Neb. 566. It follows that the judgments of the justice court and of the district court were both wrong and should be reversed.

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We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings consistent with this opinion.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HITCHCOCK COUNTY, APPELLANT, v. JOHN W. COLE ET AL.,
APPELLEES.

FILED DECEMBER 18, 1907. No. 14,919.

1. **Judicial Sale: PURCHASER.** The purchaser of real property at a judicial sale buys at his peril.
2. **Tax Sale: REDEMPTION: RECOVERY BY PURCHASER.** Under the facts stated, the purchaser should recover the purchase money paid by him from the redemptioner, and not from the plaintiff.

APPEAL from the district court for Hitchcock county:
ROBERT C. ORR, JUDGE. *Reversed.*

W. S. Morlan, for appellant.

J. W. Cole, contra.

JACKSON, C.

The county of Hitchcock had a decree foreclosing a lien for taxes on land in that county. Among the defendants in the action were John W. Cole and William Keeler. Service on William Keeler was had by publication. The decree was by default, and resulted in a sale of the land to Conrad Wagner for \$451. The sale was confirmed, and after payment of the amount due the county and the costs there remained an excess, which appears to have been paid over to John W. Cole. Within two years from the

date of the sale the heirs of William Keeler applied to the court where the decree was entered to have the decree set aside and to be permitted to defend. It appears that William Keeler held a mortgage on the land involved, and that during his lifetime this mortgage was foreclosed and the land sold to Keeler, but that no sheriff's deed had issued. Upon the final hearing of this cause in the district court, the sale in the tax proceeding was vacated and the heirs of William Keeler were permitted to redeem upon payment to Wagner of the sum of \$225, the amount of the tax lien and certain costs. Title to the premises was quieted in the heirs of Keeler, and by the same decree Conrad Wagner was given judgment against the county of Hitchcock for the sum of \$226, which the court found to be the remainder due him as purchase money paid at the tax sale after the receipt of the redemption money. The county of Hitchcock appeals.

It is not seriously contended by the appellee, Wagner, that as a matter of law the county was liable to him for any part of the purchase money paid at the sale under the tax foreclosure proceedings. What he seems to contend is that, under the condition of the pleadings, the judgment ought not to be disturbed. After the decree had been vacated and an issue tendered by the heirs of William Keeler, Conrad Wagner pleaded both to the plaintiff's petition and to the answer and cross-petition of the heirs of Keeler. The plea contains an allegation that, acting under the advice of the plaintiff and its attorney and officers, he was led to believe, and did believe, that the plaintiff had a good, valid and subsisting judgment and decree against the lands by virtue of the decree, and that, relying upon said representations of the plaintiff and the files and records of the court, he proceeded in good faith to purchase the lands and paid the sum of \$451. The prayer was that, in the event that the title was not quieted in him by virtue of the sale in the tax foreclosure proceedings, he have judgment both against the county and the heirs at law of William Keeler for the amount of purchase money,

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with interest, and costs. The county did not plead to Wagner's answer, and it is insisted that Wagner's plea is sufficient to sustain the judgment. In that contention we do not concur. The purchaser at a judicial sale buys at his peril, and the plaintiff is not liable to such purchaser on account of defective title. Under the circumstances, Wagner should have been reimbursed for the full amount of the purchase money, but the order should have been against the persons seeking to redeem. *Wood v. Speck*, 78 Neb. 435.

There is no theory upon which the judgment of the district court can be sustained, and it is recommended that the judgment be reversed and the cause remanded.

AMES and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

NORTHWEST THRESHER COMPANY, APPELLANT, v. EDDYVILLE STATE BANK, APPELLEE.

FILED DECEMBER 18, 1907. No. 15,032.

1. **Appeal: WAIVER.** Points not presented in the supreme court will be deemed to be waived.
2. **Principal and Agent: APPARENT AUTHORITY.** "The apparent authority of an agent which will bind his principal is such authority as the agent appears to have by reason of the actual authority which he has." *Creighton v. Finlayson*, 46 Neb. 457.
3. ———: ———. "Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." *Thomson v. Shelton*, 49 Neb. 644.
4. ———: **GENERAL AGENT: AUTHORITY.** An agent who, by his contract of employment, is constituted a general collection agent,

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and who, in the performance of his duties as such agent, agrees to place in the hands of a bank, for collection, notes received by him for his principal as part of the consideration for the sale by him to a third person of machinery belonging to his principal, has the power to bind his principal by a contract with said bank, authorizing the bank to make advancements for freight upon the machinery so sold and to retain the amount so advanced from the first moneys collected upon said notes and contracts.

5. **Appeal: VERDICT: EVIDENCE.** "Where there is sufficient evidence to sustain a verdict it will not be set aside, notwithstanding the supreme court might have found differently from the jury upon the testimony." *Fairfield v. Kern*, 48 Neb. 254.
6. **Evidence examined, and held sufficient to sustain the verdict of the jury and judgment of the court.**

APPEAL from the district court for Dawson county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Wilson & Brown, for appellant.

E. A. Cook, for appellee.

FAWCETT, C.

This was an action by appellant, a manufacturer of threshing machines, against appellee to recover a remainder of \$170.11 claimed to be due upon certain notes which appellee had collected for appellant, and which appellant claimed appellee failed and refused to remit. Appellee admits having received the notes for collection, admits that it collected the sum of \$270.91, and alleges that it remitted to appellant the sum of \$100.80, and that it was entitled to retain the remainder of \$170.11 as compensation for money advanced for the payment of freight upon a threshing machine which appellant had sold to one G. W. Smith under a contract entered into between appellee and appellant through appellant's agent, J. T. Clark. For reply appellant admits the sale of the machine to Smith, and the receipt of the notes of certain farmers, and "denies each and every allegation in said answer contained not herein specifically denied." These

are substantially the issues upon which the case was tried in the district court. There was a verdict in favor of appellee. Appellant's motion for a new trial was overruled, and judgment entered upon the verdict, and the case is now here for review.

Appellant assigns a large number of errors in its motion for new trial in the court below, and also in its assignment of errors in this court, but in its brief filed in this court only four of its assignments are discussed, and hence these only will be considered. Appellant's contentions here are, first, that no such contract was ever made by Clark; second, that if Clark made any such contract he was without authority so to do; third, that the contract between appellant and Smith, being in writing, could not be varied by parol; and, fourth, that the court erred in giving instruction No. 2, requested by appellee. We will consider these assignments in the order above named.

The evidence discloses that Clark, as agent for appellant, went to Eddyville for the purpose of trying to sell a threshing machine, having learned, in some manner not disclosed, that some one at that place desired to purchase a machine. On arriving at Eddyville he met Smith and entered into the contract with him, which appears in the record as defendant's exhibit 1. This contract required Smith to pay the freight charges on the machine. As part of the transaction between Clark and Smith in negotiating the sale of the machine, they together took a trip into the country and interviewed a large number of farmers for the purpose of ascertaining about how much threshing Smith would be able to secure during the first season. Defendant's exhibit 2 is a list of the farmers whom they induced to agree to employ Smith to do their threshing that year. These farmers first signed contracts. After Smith received the machine a large number of them gave their notes and evidently took up their contracts. The notes so taken were the ones which were finally sent to appellee for collection. The testimony of appellee's witnesses is to the effect that Clark and Smith went to ap-

pellee's bank and gave the officers of appellee the particulars of the deal, showed them the contracts which they had obtained from the farmers, and obtained from the officers of the bank their judgment as to the responsibility and integrity of the farmers who had signed those contracts; that Clark then asked if they thought Smith would have the money to pay the freight, and was told by appellee's officers that they were satisfied Smith would not have the money; that Clark then asked them if they would advance the freight for Smith; that they refused to do so, and that they then agreed with Clark that if he would give them the collection of the contracts, and of the notes that might be issued in lieu thereof, they would advance the freight and reimburse themselves by deducting the amount so paid from the first collections made upon the notes and contracts; that in accordance with this agreement, when the machine arrived, they paid the freight upon it, amounting to \$170.11. The evidence for and against the making of the contract is decidedly conflicting. So far as the positive testimony of the witnesses is concerned, there is a decided preponderance in favor of appellee, but the circumstances disclosed by the correspondence between appellant and appellee tend strongly to corroborate appellant's contention. While an examination of the entire record leaves some doubt in our minds as to the making of the contract claimed by appellee, we are unable to say that the verdict of the jury was manifestly wrong, and, that question having been properly submitted to the jury, we do not feel that we can disturb its finding.

In support of its second assignment that Clark had no authority to make the contract, appellant contends that Clark's only authority was as a salesman; that he had no authority to make the contract with appellee, which appellee relies upon, and reference is made to the contract of employment between appellant and Clark appearing in the record as exhibit A, attached to the deposition of G. E. Wilson, general manager and secretary of appellant. We seriously doubt appellant's right to question the authority

of Clark under the general denial in its reply, but, as appellee does not discuss that question in its brief, we do not decide it. We are unable to agree with counsel for appellant in their contention that the contract of employment gave Clark authority to represent appellant as a salesman only. The contract contains this clause: "It is the intention that said employee is to be principally employed in sales expert and collection work, unless hereafter directed to perform other work by said employer." It will be seen from this that Clark not only had authority to represent appellant in the selling of the machinery, but that he was also fully authorized to act in the matter of collections. He therefore had full authority while at Eddyville to negotiate the terms of the sale of the machine with Smith, and also to negotiate with appellee for the collection of the notes and contracts which he was receiving as a part of the consideration for the sale of the machine to Smith. It is contended by appellant that the contract between Clark and Smith was nothing more than a proposal by Smith for the purchase of the machine, and that it did not become a binding contract until approved by the managing officers of appellant. While we have some doubt as to the correctness of this contention, we do not decide the point for the reason that, if, in arranging for the collection of the notes and contracts which he was obtaining from Smith, Clark agreed with appellee that appellee should advance the freight and reimburse itself by deducting the amount so paid from its first collections upon the notes, the fact that he failed to disclose the terms of that agreement to his principal would not release appellant from its liability under the contract as made. If Clark was acting within the scope of his real or apparent authority, appellee was not in any manner responsible for his failure to correctly and fully report his acts to his principal. Clark's contract with appellee was, in our judgment, clearly within the scope of his powers as the agent of appellant for the collection of those notes and contracts. He did not by this contract release Smith from

his obligation to pay appellant the amount of the freight. The liability of Smith for the freight on the machine remains and is fully secured by appellant's mortgage; and, the jury having found in favor of appellee on this point, it follows from what we have said that if the court properly submitted that question to the jury its finding cannot be disturbed.

Appellant's third contention that the contract between appellant and Smith, being in writing, cannot be varied by parol does not arise in this case. Appellee was in no sense a party to the contract with Smith. The contract between appellant and appellee did not purport to release Smith from his obligation to pay the freight nor in any manner change the terms of the contract between appellant and Smith. It was a separate and independent contract, entered into between appellee and Clark as the agent of appellant, and must stand or fall according to its own terms, independently of appellant's contract with Smith.

We come now to appellant's last assignment, that the court erred in giving instruction No. 2, requested by defendant. The instruction reads as follows: "Ostensible authority to act as agent may be conferred if the party (to) be charged as principal affirmatively or intentionally, or by lack of ordinary care, caused (causes) or allows third persons to trust and act upon such apparent agency; and in this case, if the jury believe from the evidence that said J. T. Clark had the apparent authority to contract for the payment by the defendant bank of the freight on the threshing outfit purchased by George W. Smith, then the plaintiff is bound by the acts of said J. T. Clark, and, if you believe that the defendant by a preponderance of the evidence has established the making of said contract to pay said freight and retain the same out of the collections made by it for plaintiff, then your verdict will be for the defendant." The only objection made to this instruction by appellant is as to the first clause. Counsel say: "It will be noted that the court uses the language,

'ostensible authority to act as agent may be conferred if the party (to) be charged as principal affirmatively or intentionally, or by lack of ordinary care, caused (causes) or allows third persons to trust and act upon such apparent agency.' This instruction is erroneous, for the reason that there is no evidence in the record that could possibly impute to the plaintiff any acts or omissions which would affirmatively or intentionally, or by lack of ordinary care, give third persons the right to believe that the agent, Clark, had authority to bind the principal for the purpose claimed by the bank herein. Nor is there any evidence that could be said to cause or allow third persons to trust and act upon such apparent agency." This is the only objection urged to this instruction; hence, none other need be considered. We are unable to agree with counsel in their contention. The evidence is that Clark was the agent of appellant, fully authorized to represent them "in sales expert and collection work." This being his actual authority, we think that in making the contract with appellee he was not only acting within the scope of his apparent authority, but that he was acting within the scope of his actual authority; hence, this contention of appellant must also fail.

While, as we have already stated, we have some doubt as to the actual making of the contract, a consideration of the whole record satisfies us that we cannot, without invading the province of the jury, give appellant any relief in this action. We therefore recommend that the judgment of the district court be affirmed.

AMES and CALKINS, C.C., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOHN T. CATHERS, APPELLEE, v. JOHN H. GLISSMAN,
APPELLANT.

FILED DECEMBER 18, 1907. No. 15,052.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

John O. Yeiser and George A. Magney, for appellant.

J. O. Detweiler, contra.

FAWCETT, C.

This case made its first appearance in this court on January 12, 1907, by the filing by appellant of a certified copy of the judgment below, together with a *præcipe* and assignment of errors. Nothing further was done in this court until September 7, 1907, when appellant filed in this court a motion to supply record, and delivered to the clerk with said motion a transcript of the proceedings in the district court, a bill of exceptions, and a copy of his brief. No notice of this motion was ever served upon appellee or his attorney, nor was said motion ever presented to the court. Nothing further was done by appellant until the morning of the day when the case was called for final argument and disposition, when appellant appeared and filed another motion suggesting a diminution of record, and asking leave to file certified copies of such record, omitted, as he alleges, by mistake, which certified copy he tendered with the motion. The case, in this state of the record, was submitted to this department. Attorneys for appellant and appellee both appeared, appellant claiming the right to supply the deficiencies in the record at this time, and appellee contending that the application should be denied, and that the judgment of the court below should be affirmed or the appeal dismissed.

On consideration of the matter, we are all of the opinion that appellee's contention should be sustained; that we

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must consider the several applications of appellant to supply the record and to file the bill of exceptions as being made of this date. We do not think that such laches should be encouraged by the court. To permit appellant to do as he now desires would be encouraging a practice which would completely unsettle the procedure in this court, and would leave litigants to suffer from the gross lack of diligence of attorneys representing their opponents.

We therefore recommend that the motions of appellant for leave to supply record and his suggestions of diminution of record be overruled, and, no error appearing in the certified copy of the judgment filed January 12, 1907, that the judgment of the district court be affirmed.

AMES and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the motions of appellant for leave to supply record and his suggestions of diminution of record are overruled, and the judgment of the district court is

AFFIRMED.

HENRY GUND, APPELLEE, V. ELIAS BALLARD ET AL.,
APPELLANTS.

FILED DECEMBER 18, 1907. No. 15,113.

1. **Appeal: REMAND WITH DIRECTIONS.** Where this court has determined the questions of fact and fixed the liabilities of the parties in a suit, and remanded the case to the district court, with specific directions to that court to enter its judgment in accordance with the findings and judgment of this court, as set out in its opinion, it is then too late to bring in new parties or to raise new or different issues.
2. **Banks: INSOLVENCY: INDEBTEDNESS OF STOCKHOLDER: INTEREST.** Where a stockholder in a bank which is in process of liquidation, who

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and his principal, and thereby escape all liability for the payment of interest on the principal sum of the indebtedness for which he thus became obligated. It must be accepted, we think, as fundamentally correct that he could not be permitted to profit by his own wrongful action, nor by the action of the bank on the one part and himself on the other, to the prejudice of the stockholders, he holding, as he did, the fiduciary relations then existing between him and the corporation and those it represented. *Sternburg v. Callanan*, 14 Ia. 251; *Oliver v. Lansing & Ingham*, 48 Neb. 338. On the other hand, a court of equity will not enforce a usurious contract prohibited by law. A court of equity, it seems to us, should require him to do equity, and this demands of the plaintiff that, in order to discharge his liability to the bank, he must pay the principal indebtedness, together with the legal rate of interest accruing thereon during the time of the running of the debt. *Eiseman v. Gallagher*, 24 Neb. 79; *Frenzer v. Richards*, 60 Neb. 131." The above reasoning by the chief justice is eminently sound, and has our approval. The cause was remanded to the district court, "with directions to ascertain the amount justly due from the plaintiff, according to the views herein expressed, and to make such further and other orders in the premises as seem to be just and equitable, not inconsistent with this opinion, to the end that all of the rights of all parties to the litigation may be fully and finally adjudicated and determined."

In the opinion the court determined the question that, while the note referred to was tainted with usury, the relations of plaintiff Gund to the bank were such that he could not avail himself of the plea of usury, and thereby escape payment of lawful interest; that, while a court of equity will not enforce a usurious contract by compelling the payment of usury, it will require a party occupying the fiduciary relation to the payee which was occupied by plaintiff in this case to do equity by paying lawful interest; and that as plaintiff had full knowledge of the items which went to make up the consideration for the note

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which he signed with Hayes, and had received from Hayes Bros. a large amount of property in consideration of his assuming the indebtedness represented by said note, according to its terms, the court would not go behind the execution of the note and inquire whether it contained any usury or not, but would take the note as fixing the amount of plaintiff's liability on that date, and would only consider the question of usury subsequently thereto. This left nothing for the district court to do when the case was remanded but to state the account between the plaintiff and defendant bank subsequent to the date of the note. This the district court has done, and so far as the court has correctly carried out its figures it has followed the directions of this court.

After the case was remanded, through the efforts of plaintiff's attorneys, Hayes was induced to intervene in the case, and an attempt was made by plaintiff to try again the question of usury which had been disposed of by the former decision of this court. We do not think that Hayes was a necessary or even proper party after the case had been remanded. His going into the case at that time could not in any manner affect the issues which had already been determined. If plaintiff desired him to be a party in the case, he should have made him a party in the first instance. He could not wait until after the issues had been fully determined by this court, and then, after the case was remanded with specific directions, bring him into the case for the purpose of trying again issues which had already been finally adjudicated, and which it is clear would have been adjudicated in precisely the same manner they were, even if Hayes had been a party on the first hearing. The fact that the district court permitted Hayes to intervene is immaterial, however, for the reason that his intervention was not permitted in any manner to influence the court in its findings and judgment.

An examination of paragraph 4 of the decree entered by the court shows a clerical error of \$1,000. In that paragraph the court makes specific findings of the amount

due under the note, showing the amount due with interest at 7 per cent. to December 31, 1901, but in making the footing the total is stated as \$5,335.50 when it should be \$6,335.50. This error affecting a number of the other findings, as shown in several of the subsequent paragraphs of the court's decree, necessitates a recasting of the decree. The court charges plaintiff with interest to December 31, 1901, instead of to the date of the decree, and complaint is made of that fact by appellants, Lane and Sands, who contend that plaintiff should pay interest to the latter date. We think this contention should be sustained. The fact that the money was in the hands of the managing directors during all of the time subsequent to December 31, 1901, is not sufficient to relieve plaintiff from his liability to pay interest upon his indebtedness, for the reason that, while the money was in the hands of the managing directors, it was not available for the payment of plaintiff's note, but by the proceedings being prosecuted by plaintiff was withheld from distribution, thereby damaging the stockholders to the extent of the lawful interest thereon. We hold, therefore, that in the new decree the court should compute interest upon the net amount due from plaintiff to the bank on December 31, 1901, from that date to the date of the decree.

Complaint is made by plaintiff and cross-appellant, Hastings, that the court erred in paragraph 11 of its decree in charging them with interest at the rate of 2 per cent. per annum for not depositing the funds in bank at interest pending the litigation and after a supersedeas bond had been filed. We think the court was right. It appears from the evidence that the money had been on deposit in three banks, one of which was paying 3 per cent., and each of the others 2 per cent., but that plaintiff and cross-appellant, Hastings, after they obtained the custody of the funds, placed them in a bank of which plaintiff was a stockholder, without interest. We think the district court was fully warranted in holding that they were "negligent" in that particular. The bank had been paying

that rate of interest upon the money prior thereto, and a supersedeas bond had been filed, which would necessarily prevent a distribution of the money for a considerable period of time. We think it was clearly their duty to at least have used reasonable diligence to have deposited the funds in some responsible bank where they would have drawn the rate of interest customary on such deposits. The evidence does not disclose that they ever made any such attempt, but, on the contrary, they deposited the money in a bank in which plaintiff was personally interested, and without interest.

Complaint is made by appellants, Lane and Sands, of paragraph 10 of the court's decree, in which it allowed the trustees, Hastings and Gund, \$500 and \$250, respectively, for services in connection with the liquidation of the bank, the contention being made that they had not acted in good faith in relation to the attempt of plaintiff to escape payment of a large portion of the note in controversy. From the amount allowed by the court it is evident that no compensation was allowed to either of these trustees for any service performed or money expended on account of this litigation. While we perfectly agree with the contention of counsel for appellants, Lane and Sands, that the directors would not be entitled to any compensation of that character, we are not prepared to hold that the trustees would have to perform the large amount of work and bear the responsibility of closing up the affairs of the bank without just compensation therefor. No question is made that the amount allowed by the court is unreasonable, and its findings in that particular should be affirmed.

Complaint is also made by appellants, Lane and Sands, that the court erred in paragraph 14 of its decree in refusing to make them an allowance for attorneys' fees in this cause. At the oral argument we were inclined to think that in this the court had erred; but upon more mature deliberation and a careful examination of the record we have reached a different conclusion. The ap-

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pearance of the attorneys for appellants, Lane and Sands, was for them only. They did not appear for them and all of the other stockholders, or for them and all stockholders similarly situated. What they did was to appear for those two parties alone and litigate their contention as to the distribution of a fund, which was already in existence, in the hands of the trustees and subject to distribution to the parties entitled thereto as their respective rights might be determined by the court. This was not sufficient to entitle appellants, Lane and Sands, to a payment of their attorneys' fees out of the general fund.

We therefore recommend that the cause be remanded to the district court, with directions to correct paragraph 4 of its findings by changing the total footing from \$5,335.50 to \$6,335.50, and to correct the other findings in accordance therewith, and to compute interest upon the net amount found due from plaintiff, Henry Gund, on December 31, 1901, to the date of the decree which it shall enter, at the rate of 7 per cent. per annum, and enter its decree therefor, and that in all other respects the decree of the district court be affirmed.

AMES and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the cause is remanded to the district court, with directions to correct paragraph 4 of its findings by changing the total footing from \$5,335.50 to \$6,335.50, and to correct the other findings in accordance therewith, and to compute interest upon the net amount found due from plaintiff, Henry Gund, on December 31, 1901, to the date of the decree which it shall enter, at the rate of 7 per cent. per annum, and enter its decree therefor. In all other respects the decree of the district court is affirmed.

JUDGMENT ACCORDINGLY.

ANDREW B. STARKEY ET AL., APPELLANTS, v. SAMUEL L.
PALM, APPELLEE.

FILED DECEMBER 18, 1907. No. 14,975.

Intoxicating Liquors: LICENSE: PETITION: FREEHOLDER. The statutory qualification of a freeholder as a petitioner upon an application for a saloon license does not require evidence so conclusive as would be requisite to enable him to recover in ejectment against an adverse claimant, but it is sufficient if he has by record or documentary evidence, or both, and in good faith claims and believes himself to have a freehold estate in lands within the prescribed district within which he resides.

APPEAL from the district court for Dundy county:
ROBERT C. ORR, JUDGE. *Affirmed.*

W. S. Morlan and R. D. Druliner, for appellants.

D. G. Himes and Boyle & Eldred, contra.

AMES, C.

This is an appeal from a judgment of the district court affirming an order of the trustees of the village of Benkelman granting a saloon license. The sole objection is that certain of the petitioners lacked the qualification of being freeholders. Concerning this qualification we are of the opinion that the statute does not require evidence so conclusive as would be requisite to enable the petitioner to recover in ejectment against an adverse claimant. So strict a rule would prolong the hearing of a remonstrance indefinitely, and entail an expenditure of time and money so great as practically to convert the statute into an absolute prohibitory law, which was evidently not the legislative intent that it should be. We think the statute is satisfied if the petitioner has by record or documentary evidence, or both, and in good faith has and claims a freehold estate in lands within the prescribed district within which he resides.

Two of the petitioners had purchased and acquired title

to a village lot some six months before signing the application. Something more than a month prior to that time they had entered into an executory contract for the sale of the same, conditioned upon the payment of the purchase price four months thereafter. Meantime they were to retain the title, and may still retain it for aught that we know. They, of course, were before the making of the contract, and afterwards continued to be, freeholders. Counsel suggests that such a transaction or a similar one might be made use of as a fraudulent device for the colorable qualification of petitioners. In such case the courts would, upon due proof, doubtless treat it accordingly, but there is no evidence that this is an instance of that kind. Another petitioner had purchased a lot subject to tax liens about a month before signing the petition. He gave no reason for making the purchase, but there is no evidence that it was colorable, that is, not a real purchase and acquisition of the title, and if it was such his motive is immaterial, but there is no evidence as to his motive. Another petitioner was the purported grantee in a deed executed some ten years previously, but not filed for record until about two months before signing. Her name seems to have been written in place of that of another as grantee, which latter had been erased. The erasure and substitution might have been innocent, and the court will not, without proof, presume it to have been fraudulent and criminal. As to several other deeds, it was shown that they were obtained shortly before signing, and recited nominal considerations only, and that some of them were acknowledged before a notary public who was also attorney for the applicant; and hence it is urged that the motive of the grantees was to qualify themselves as petitioners. This, however, is an inference or suspicion only, and not supported by proof. There is not shown any concert of action between the several grantees or grantors, nor any conspiracy between either and the applicant, nor is it shown that in any instance the title acquired was colorable only, and, as we have said, the law does not make the motive material, pro-

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vided the character of the freehold is actual or *bona fide*, not pretended. Four of the petitioners were grantees by several deeds from one Hundley, who is alleged to have held the title as trustee of a partnership or corporation called the "Northwestern Cattle Company," but there is no competent proof of the assertion, and, if it be true, it does not appear whether the company authorized or ratified the transfer. The conveyances will not be presumed to have been breaches of trust. Counsel cites and relies on *Colglazier v. McClary & Martin*, 5 Neb. (Unof.) 332. We do not think that opinion is sufficient to warrant a reversal in this case. Under the statute as it now is the only question for the courts in this regard is whether the petitioners are in good faith and reality, as distinguished from colorable, freeholders.

The evidence does not convince us to the contrary, and we think that the judgment of the district court is right, and recommend that it be affirmed.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

OTIS M. SMITH, APPELLEE, v. WESTERN UNION TELEGRAPH COMPANY, APPELLANT.

FILED DECEMBER 18, 1907. No. 15,017.

1. **Telegraphs: NEGLIGENCE: EVIDENCE.** For a breach of its contract to transmit a message over its lines a telegraph company is liable for such damages as may reasonably be supposed to have been within the contemplation of both parties at the time the contract was made, and, such damages being dependent upon the knowledge of the parties at the time, proof thereof by evidence of facts and circumstances additional to such as are disclosed by the message itself is admissible.
2. **Appeal: INSTRUCTIONS: ASSIGNMENTS OF ERROR.** When a trial court

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has instructed a jury generally upon the issues and law of a case, and there has been no request for different or additional instructions, an assignment of error in this court that "the court erred in failing to instruct the jury as to the law of the case" is too vague to call for consideration.

3. ———: EVIDENCE: ASSIGNMENTS OF ERROR. An assignment of error that "the court erred in the admission of incompetent evidence as to the measure of damages" is too vague to invoke the judgment of this court.

APPEAL from the district court for York county:
ARTHUR J. EVANS, JUDGE. *Affirmed.*

George H. Fearons, Francis A. Brogan and France & France, for appellant.

Gilbert Bros., contra.

AMES, C.

There seems to be no important dispute of fact in this case. The plaintiff was, and for some time had been, a grain dealer at the city of York, in this state; his business, consisting principally in purchasing grain from farmers and shipping it to and selling it at distant markets in the east and south. These facts were well known to the defendant, the Western Union Telegraph Company, through its agent and operator at said city, who was and for some time had been accustomed to receive and transmit over the defendant's lines daily a large number of telegraph messages relating to the plaintiff's business, and between the latter and distant persons and firms with whom he transacted his business, and particularly between him and a commission house or firm named Ballard, Messmore & Company, located at the city of St. Louis, Missouri. The operator knew also that such messages were frequently written in cypher so as to be partly or wholly unintelligible to persons not familiar with or in possession of the "key" by which they were interpreted. On the 13th day of July the plaintiff received a cypher telegram from Ballard, Messmore & Company, which being interpreted

means that they would, upon his acceptance of their offer before 9:30 o'clock A. M. of the next day, pay him 93 cents a bushel for 10,000 bushels of a certain description of wheat, if actually delivered within a specified time. After having during the day of the receipt of the message supplied himself with the required grain, the plaintiff shortly before 8 o'clock on the following morning delivered to the operator for transmission a message in the following words: "York, Neb., 7-14-1905. Ballard, Messmore & Co., St. Louis, Mo. Accept detailed absolutely accursed, will run very near sample will all be accursed. O. M. Smith." This message, which was delivered to the operator in time for transmission and delivery on or before 9:30 o'clock on the same day, is interpreted as follows: "Accept 93 cents, 10,000 bushels No. 2 hard wheat. Will run very near sample. Will all be No. 2 hard wheat." It is not shown that the operator interpreted the message or was competent so to do, or that any one explained it to him, or that he knew or could have known its exact meaning or the subject to which it related, except by inference from his knowledge of the foregoing circumstances. He negligently delayed sending the message for several hours, and in the meantime the market price of wheat fell to the extent of $5\frac{1}{2}$ cents a bushel, entailing a loss of that amount, or \$550 in all, upon the plaintiff, to recover which as damages this action was brought. The answer, except that it admits the corporate character of the defendant and the receipt of the message for transmission, is a general denial. There is a reply, which, however, does not affect the issues as thus stated. There was a trial to a jury, and a verdict and judgment for the plaintiff, from which the defendant appealed.

The principal reliance of the defendant is upon the rule announced in *Hadley v. Baxendale*, 9 Exch. (Eng.) *341, which has been generally, if not universally, adopted in this country, both by the United States and state courts, and which is expressed in the following language: "Where two parties have made a contract, which one of them has

broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210; *French v. Ramge*, 2 Neb. 254. The rule, we think, is too well settled, both in this state and elsewhere, to permit of criticism or require discussion: Neither does there seem to be any doubt that in the absence of legislation it applies in its full extent and meaning to contracts, express or implied, for the transmission of messages over telegraph lines. *Western Union T. Co. v. Hall*, 124 U. S. 444; *Primrose v. Western Union T. Co.*, 154 U. S. 1; *Western Union T. Co. v. Coggin*, 68 Fed. 137; *Fergusson Bros. v. Anglo-American T. Co.*, 178 Pa. St. 377; *Candee v. Western Union T. Co.*, 34 Wis. 471. And the rule is held to apply with especial force in cases in which the message is in cypher, so as to be unintelligible to the company or its agents, and who are therefore presumably ignorant of its purport and purpose. *United States T. Co. v. Gildersleeve*, 29 Md. 232; *Western Union T. Co. v. Wilson*, 32 Fla. 527; *Cannon v. Western Union T. Co.*, 100 N. Car. 300. The purport of all these decisions, and of many others that might be cited, is that in an action against a telegraph company to recover damages for failure to transmit a message, unless the language of the message itself discloses that special loss or injury will probably result from such failure, or that fact is made known to the agents of the company by some other means, the measure of damages will not exceed the cost of transmission; otherwise, the requirement of the rule that only such damages are recoverable "as may reasonably be supposed to have been within the contemplation of both parties at the time they made the contract" will not be satisfied.

But it is equally well established by the authorities, or some of them, and deduced with logical necessity from principle and analogy, that knowledge of purport or purpose and of the nature of the loss or injury that will probably result from delay or error in transmission may be imparted to the company, so as to fix upon it a liability for substantial damages, as well by circumstances as by formal or explicit notice, or by the language of the message itself, and in the former case the fact, if it be one, that the message is wholly or partly cryptogram, is immaterial, except in so far as it may serve as an item of evidence for the proof or disproof of knowledge. 27 Am. & Eng. Ency. Law (2d ed.), 1063, and cases cited in note. This doctrine was fully adopted by this court in *Western Union T. Co. v. Church*, 3 Neb. (Unof.) 22, a case in some of its features not unlike this. The opinion, which cites and comments upon the authorities at considerable length, is reported as unofficial, but, inasmuch as the question was the sole vital point in the case and the decision was approved by the court as being "right," it cannot be regarded otherwise than as expressing the deliberate and unanimous judgment of the judges as well as that of the commissioners in this essential particular. Applying this rule to the case at bar, the above related facts, and some minor circumstances of like nature, but not recited, presented an issue of fact upon the question of knowledge appropriate for the determination of the jury, and constitute evidence sufficient to sustain their verdict in that respect. *Baldwin v. United States T. Co.*, 45 N. Y. 744.

There are two other assignments of error mentioned in the appellant's brief: "(2) The court erred in failing to instruct the jury as to the law of the case; (3) the court erred in admission of incompetent evidence as to the measure of damages." Both these assignments are too vague to invoke the judgment of this court. The trial judge did instruct generally upon the issues and law of the case. To several paragraphs of these instructions the defendant excepted, but no request for instructions was made on its

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behalf, nor any objection that those given were not adequate to submit all the issues of fact to the jury under the court's view of the law applicable thereto. What specific instance or instances of admission of incompetent evidence occurred is not pointed out. The damages allowed appear to us to have been the probable and proximate result of the delay in the transmission of the message, and not excessive in amount.

We discover no error in the record, and recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FIRST NATIONAL BANK, APPELLANT, V. BLAIR STATE BANK
ET AL., APPELLEES.

FILED DECEMBER 18, 1907. No. 15,027.

Statute of Frauds: SALES: SUBSEQUENT PURCHASER. When a vendor of chattels by a contract voidable by the statute of frauds makes a subsequent valid sale or pledge and delivery of the same chattels to a third person, he thereby repudiates and avoids the former contract, and the subsequent purchaser may invoke the statute for his own protection.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

Thomas Stapleton, James H. Van Dusen and W. C. Lambert, for appellant.

F. A. Brogan and Herman Aye, contra.

AMES, C.

In June, 1900, Mrs. L. F. Armstrong was the owner or in the possession of a cattle ranch and engaged in the live

stock business at Elm Creek in Buffalo county, in this state. On the 30th day of that month she executed two mortgages on parts of her herd, one which became the property of the First National Bank of Marengo, Iowa, and the other the property of the Blair State Bank of Blair, in this state. Her business seems to have been in the charge of her husband. At any rate, counsel for both parties to this suit treat him as her *alter ego* and impute his conduct to her unqualifiedly. On the morning of the 30th day of November, 1903, an officer and agent of the Marengo bank visited Elm Creek, and had there an interview with the husband with reference to the first mentioned indebtedness. At that time there were no cattle on the ranch answering to the description contained in the mortgage, but there were 40 odd head of cattle upon the premises and belonging to Mrs. Armstrong, which were described in the mortgage owned by the Blair bank, and 83 head belonging to her and not incumbered. It was agreed between Armstrong and the representative of the Marengo bank that the 83 head should be delivered to the latter, and be by him shipped to South Omaha and sold upon the market, and the proceeds of the sale applied toward the satisfaction of the indebtedness held by him. Elm Creek is situated on the line of the Union Pacific Railroad Company about 16 miles west of Kearney, but cars for the proposed shipment could not then be obtained at either place, and on the afternoon of the same day Delaney, the agent, returned east in quest of them. Nothing was paid in consideration of the agreement and none of the cattle were delivered to Delaney, and no written memorandum was made, but it was agreed that the cattle should remain in the custody of Mrs. Armstrong and be cared for by her husband, as had formerly been the custom, until they should be taken under the agreement. In the afternoon of the same day Armstrong visited Kearney. In the morning of that day the Blair bank had retained Robbins, an attorney at Kearney, and had instructed him in general

terms to look after their interests as the owner of the other mortgage and indebtedness belonging to it. Armstrong, upon his arrival in Kearney, met Robbins and told him in substance of the arrangement between the former and Delaney. The value of the cattle in the possession of the mortgagor and answering the description in the mortgage of the Blair bank was insufficient to satisfy the debt secured by that instrument, and Robbins asked Armstrong to make good the deficiency in part by delivering to him for his client the 83 head of the unincumbered cattle which were the subject of the agreement between Armstrong and Delaney. With this request Armstrong was reluctant to comply, mentioning as an obstacle to so doing that he did not intend to return at once to Elm Creek. To obviate this objection Robbins suggested that Armstrong write a note to his wife instructing her to deliver the animals, which he finally consented, or seemed to consent, to do, and he wrote and sealed a note, which he addressed to his wife and entrusted to Robbins for delivery. The contents of the note are not disclosed by the evidence, but Robbins gave it to an assistant named Swan, who on the next day, December 1, carried it to Elm Creek and delivered it to Mrs. Armstrong, and then, with the help of a hired man of the latter, drove the cattle from the pasture into a corral or feed lot, in which he fastened, fed and kept them for four or five days without objection from the Armstrongs, at the end of which time, and also without such objection, he shipped them to South Omaha, consigned to the Blair State Bank, where they were sold on the market, and the proceeds of the sale appropriated by that institution in part satisfaction of its demand. It does not appear that the Armstrongs or either of them have in any manner or at any time since the interview with Robbins been ignorant of, or have objected to, this transaction in any particular, but they appear to have silently acquiesced therein. This action was begun in May, 1904, and tried in April, 1906, upon an amended petition alleging a sale and delivery of the cattle to the

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Marengo bank by L. F. Armstrong and a subsequent wrongful seizure and conversion of them by the Blair bank. The answer, besides a general denial, alleges ownership of the cattle in the defendant by reason of the transaction above set forth, and as a separate defense pleads the statute of frauds as against the alleged purchase by the plaintiff. There was a trial to a jury, and a directed verdict and judgment for the defendant, and the plaintiff appealed.

There is no contradiction in the evidence and no dispute of law, except as to the availability of the statute of frauds as a defense for the defendant bank. In other words, it is not disputed that the statute would have been a complete defense for Mrs. Armstrong to a similar action by the Marengo bank against her, or that in such an action she might have waived the statute, and that in that event the transaction between her husband and Delaney would properly have been adjudged sufficient to transfer the title to the Marengo bank, by which she would have been converted into a mere custodian of the cattle for it. Neither is it disputed that the protection of the statute extended, or would have extended, to any one who was by contract privy with her in title. This latter proposition seems also to have been set at rest by the previous decisions of this court. *Hansen v. Berthelsen*, 19 Neb. 433; *Dailey v. Kinsler*, 35 Neb. 835. The reason for this latter rule was, we think, concisely and correctly stated by the supreme court of Indiana in *Hunter v. Bales*, 24 Ind. 299, as follows: "The vendor makes his election to treat the prior verbal contract as void, whenever he makes a valid agreement of sale in the face of it, and that the intermediate purchaser, in such a case, is shielded by the statute, as well as the vendor." The principal, if not sole, ground of contention by counsel for the plaintiff, if we correctly understand him, is that Robbins' authority as agent and attorney for the defendant extended only to enforcing the mortgage of his client against the property described therein, and that the transaction by which he obtained possession of

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the cattle in question, even if he had the consent thereto of the Armstrongs, which is denied, was in excess of his powers, and consequently ineffectual to transfer the title to the Blair bank. Granting such to have been the situation at the time he took possession of the animals, which we do not decide, that act was not one in its nature unlawful, but was one for the benefit and in furtherance of the interests of his client, which the latter was at liberty to, and which it in fact did, ratify and confirm before the plaintiff made any attempt to intervene or effectually to impeach it. As respects Armstrong, we have the uncontradicted testimony of Robbins that at the time of the interview in Kearney the former consented to turn over the cattle to him for the satisfaction of his client, and that in connection with such consent he wrote and addressed the note to his wife, in apparent compliance with which her employee assisted in making the transfer, to which she or her husband never made objection, though both had ample opportunity so to do before the cattle were shipped away. The evidence, to our minds, appears so conclusively in favor of the defendant in this respect that, in our opinion, a verdict in favor of the plaintiff could not be permitted to stand.

It is immaterial whether the transaction was a pledge or a sale, or whether it was consummated by the delivery to Swan or by subsequent ratification and acquiescence, or what was the scope of Robbins' powers as agent or attorney. In any event, the title passed before the plaintiff intervened, and the defendant was and is rightfully and lawfully in the possession of the cattle and of the proceeds of their sale. When a vendor of chattels by a contract of sale which is voidable by the statute of frauds makes a sale or pledge and delivery of them to a third person, he thereby repudiates and avoids the former contract, and the subsequent purchaser may invoke the statute for his own protection. *Hunter v. Bales, supra*; *Petty v. Petty*, 4 Mon. (Ky.) 215.

We do not consider that *Rickards v. Cunningham*, 10

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Neb. 417, and *Cresswell v. McCaig*, 11 Neb. 222, cited by the plaintiff, are in point. In both of these cases the party seeking the protection of the statute was a creditor claiming adversely to both the vendor and the vendee. It is true that the defense of the statute of frauds is a personal one, but it is so in a sense somewhat different from that in which the term is used in some other instances, as, for example, the case of usury. It is free from the same degree or kind of moral obligation as that which affects the latter, and a third person, who by a voluntary and valid contract with the vendor succeeds to the title and possession of the latter, succeeds also to his right to protect that title against a previous void or voidable agreement.

We recommend, therefore, that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA V. ISAAC R. ALTER ET AL.

FILED DECEMBER 18, 1907. No. 15,369.

Pleading: SUFFICIENCY. When, in an action to quiet title, the petition sets forth the adverse title or interest in general terms, but without especial or particular description, the pleading is not for that reason obnoxious to a general demurrer, but the remedy of the defendant is a motion to require the petition to be made more definite and certain.

ORIGINAL action by the state to quiet title to certain lands occupied by the soldiers and sailors home at Grand Island. Defendants demurred. *Demurrer overruled. Decree for plaintiff.*

William T. Thompson, Attorney General, and W. B. Rose, for plaintiff.

R. R. Horth, contra.

AMES, C.

This is an action begun originally in this court for the purpose of procuring a decree quieting title in the state to a part of the site of the soldiers and sailors home at Grand Island as against certain persons who are grantors in deeds conveying the premises to the state for the purposes of such site. The cause was submitted upon a general demurrer to the petition without brief or oral argument on behalf of the defendants, so that we are left to conjecture what ground there may be, if any, for the former, which we are unable to do. The petition sets forth a deed executed jointly by the defendants, and reciting that "for and in consideration of the sum of one dollar and the location of the soldiers and sailors home as per an act of the legislature of the state of Nebraska entitled 'An act to establish and maintain a soldiers and sailors home,' in hand paid by the state of Nebraska" (the grantors) "do hereby grant, bargain, sell, convey and confirm unto the state of Nebraska" the premises in question. The instrument also contains the covenants against incumbrances and of title and quiet possession and enjoyment usually found in deeds of general warranty. The petition further alleges the due execution and delivery of the deed, and that it was filed for record on April 1, 1887, and that on the 30th day of March, in the same year, the state went into possession of the premises, and has remained in the possession of the same thence continuously until the commencement of this action, a period of more than ten years, during which time it has located, erected and maintained buildings thereon for the uses and purposes of a soldiers and sailors home, pursuant to said act, and continues so to maintain and use the same. But it is further alleged that the defendants falsely claim and pretend to have some right, title or interest in or to the premises adverse to the right, title or interest of the plaintiff, the nature of which is to the plaintiff unknown, but which is effectual as a cloud upon the plaintiff's title and against which it

is prayed that the plaintiff's title may be quieted by a decree of this court.

We think it unnecessary to discuss the general rules of law relative to the construction and effect of deeds of conveyance similar in form to that above described. The act of the legislature recited in the deed in question is, by the operation of a familiar rule of law, a part of the instrument itself, and that act provides that location of the institution at Grand Island shall be upon the condition that a site therefor shall be provided, which "shall be donated and conveyed to the state of Nebraska in fee simple." There is no expression known to the law that is more unequivocal or completely free from any sort or kind of ambiguity or doubt than the phrase "fee simple." It means an absolute title or estate in lands wholly unqualified by any reversion, reservation, condition, or limitation or possibility of any such thing, present or future, or precedent or subsequent, and it follows of necessity that, when a grant is made expressly pursuant to and in compliance with an act of the legislature requiring the creation of such a title or estate as a condition to its validity for any purpose, the grantor is estopped to allege anything in contravention of the legislative intent or in diminution of the estate described by the statute.

The attorney general has suggested that possibly the ground of the objection is that the petition does not set forth specifically or particularly a description of the adverse title or interest claimed by the defendants. We are not surprised that he confesses his own incompetency so to do, and strongly suspect that the defendants are afflicted with the same disability. It was formerly held that, in the absence of such a description, a petition to quiet title does not disclose a cause of action, because the court cannot determine from the face of the pleading that the defendant is asserting any claim sufficiently tangible to injure the plaintiff or cast a cloud upon his title. *McDonald v. Early*, 15 Neb. 63. If the petition is defective in this respect, the proper method of attack was by motion

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to require it to be made more definite and certain, which has been waived by the filing of a general demurrer. *Fritz v. Grosnicklaus*, 20 Neb. 413. We think this latter decision must be regarded as overruling the former, in so far as the former holds that a petition omitting a description of the adverse claim or title is for that reason obnoxious to a general demurrer. A defendant in such a case has two sufficient means of protection; one is the motion mentioned, and the other, if he has made no claim at all and is therefore vexatiously sued, to file a disclaimer and be awarded his costs.

We recommend, therefore, that the demurrer be overruled.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the demurrer is overruled; and the parties electing to not plead further, judgment is entered for plaintiff as prayed.

JUDGMENT ACCORDINGLY.

CHARLES W. SANFORD ET AL., EXECUTORS, APPELLEES, v.
FRANK A. LUNDQUIST ET AL., APPELLANTS.*

FILED DECEMBER 18, 1907. No. 14,921.

1. **Usury: COMPOUND INTEREST.** A contract to pay compound interest is not usurious, and will be enforced; but not in excess of the amount of simple interest computed at the maximum rate allowed by law.
2. ———: **INTEREST ON INTEREST.** Where the original obligation bears interest at the maximum rate allowed by law, there is no consideration for an agreement to pay interest upon interest computed for a time past and thus retrospective in its operation; but including such interest upon interest in a renewal note does not make the same usurious. It is enforceable for the amount thereof, less the interest upon interest included therein.

* Rehearing allowed. See opinion, p. 414, *post*.

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3. Interest: PAROL AGREEMENT. Simple interest may, when it becomes due, be added to and made a part of the principal by including the same in a renewal note, or by a separate instrument given for that purpose, and thus be made to bear interest; but a mere oral promise to pay interest upon interest so accrued for an indefinite forbearance is not enforceable.

APPEAL from the district court for Saunders county:
BENJAMIN F. GOOD, JUDGE. *Reversed.*

Simpson & Good and Berge, Morning & Ledwith, for appellants.

M. B. Reese and H. A. Reese, contra.

CALKINS, C.

This was an action to foreclose a mortgage, and the defense was usury. There were several causes of action stated in the petition upon different instruments; but, as the facts are similar, it will only be necessary to state in detail those from which arose the first cause of action. On the 16th day of March, 1885, the defendant obtained from the plaintiff a loan in the sum of \$450, for which he executed his promissory note for that amount, payable in five years from date, with interest at 10 per cent. per annum. Forty-five dollars, the first year's interest, was deducted from the loan at the time it was made; and four notes for \$45 each, maturing, respectively, on the 1st days of January, 1886, 1887, 1888 and 1889, were executed and delivered for the subsequent instalments of interest. These interest notes were drawn to bear interest after maturity. On March 14, 1900, three of the coupon notes had been paid; and the defendant on that date executed in renewal of the principal and interest unpaid his promissory note for the sum of \$1,295.25, payable October 1, 1900, with interest at 10 per cent. per annum. The amount of this note was ascertained by compounding the interest unpaid on the original note annually. The mortgage sought to be foreclosed secured these notes. There was a trial upon the issues, and a finding by the judge of the

district court that, when interest became due upon each of the items making up the first and second causes of action, the plaintiff and defendant entered into an agreement that the plaintiff should carry such interest as separate loans, and should receive interest thereon at the rate of 10 per cent. per annum. From a decree upon this finding for the full amount the defendants appeal, contending, first, that the plaintiff was not entitled to include in the renewal notes any interest in a sum in excess of 10 per cent. simple interest upon the principal of the original note; and, second, that the renewal notes, having been taken for a sum in excess of the amount due on the original notes figured as simple interest, were usurious, and that the plaintiff is not, therefore, entitled to recover any interest on the renewal notes, being limited to the amount due on the original notes at the time the renewals were made.

1. A contract to compound interest on an obligation bearing less than the maximum rate is valid, if, when so computed, the interest does not exceed in amount simple interest computed at the maximum rate. *Richardson v. Campbell*, 34 Neb. 181. Such contract will not, however, be enforced beyond the limit of the highest rate allowed by law computed as simple interest. *Mathews v. Toogood*, 23 Neb. 536; *Rose v. Munford*, 36 Neb. 148. In neither case is the contract usurious, nor subject to the penalties of the statute against contracting for or receiving interest in excess of the amount limited by law. *Hager v. Blake*, 16 Neb. 12; *Rose v. Munford*, *supra*; *Lewis Investment Co. v. Boyd*, 48 Neb. 604. While the rule against allowing compound interest in excess of the highest legal rate computed as simple interest is not universal, it is general, and has been fully adopted in this state. It does not rest upon the ground that the agreement is usurious, but rather upon the ground that it is against public policy. These decisions do not declare the instruments subject to the penalties of usury. They simply refuse to enforce the stipulation for interest upon interest.

2. It being plain that the stipulation in the original obligation for compound interest did not make the contract usurious, it remains to consider the effect of including in the renewal notes compound interest. If a contract to pay compound interest before it has accrued is not usurious, it would seem that a contract to pay it after it is earned could hardly be subject to that vice. Some jurisdictions that refuse to enforce an agreement in advance to pay compound interest treat agreements made after it has accrued as valid. In these it is said that the borrower is under a moral obligation to pay interest on the interest which he failed to pay when it became due, and therefore, if he chooses to recognize this obligation and to pay such interest on interest or to give a new note of which it is a part of the consideration, that the transaction is not usurious, nor without sufficient consideration to support it. *Telford v. Garrels*, 132 Ill. 550; *Gilmore v. Bissell*, 124 Ill. 488. While we are satisfied that such inclusion of interest upon interest does not make a contract usurious, we cannot agree to the conclusion that there is a sufficient consideration for it. The rule against enforcing a contract by the debtor to pay compound interest in excess of the amount of simple interest computed at the maximum legal rate is founded upon the same reasons as are all usury laws. It is assumed that the debtor and creditor do not stand upon equal terms, and that it is necessary and proper to protect the former, as well from the consequences of his own imprudence and shiftlessness as from the oppression and rapacity of the latter. Whether the reasons for the rule are good, or the necessity for its adoption is real, we do not consider, for it is too firmly established to be changed, except by legislative enactment. Being the settled rule of law in this state, it should be so construed as to fulfil its reason and effectuate its purpose. It seems to us illogical to say that the debtor is under a moral obligation to perform a contract which the court has absolved him from on the ground that it savors of usury and is

against public policy. Every consideration that has led this court to adopt the rule in cases where the interest is contracted for in advance applies with equal or greater force where the agreement is made retrospectively. It was said by Mr. Chancellor Kent in *Van Benschooten v. Lawson*, 6 Johns. Ch. (N. Y.) *313, in speaking of such an agreement: "It is equally objectionable, as an agreement made at the time of the original contract or loan, that compound interest should begin and run upon the lawful interest the moment it falls due, whether payable yearly, half yearly, or quarterly; and such agreements are held to be oppressive. To exact from the debtor interest on the previous arrears of interest, without a previous special and particular agreement for that purpose, is inadmissible. It has no valid basis, nor any acknowledged legal consideration, on which it can rest, if the previous agreement, made at or after the time the interest became due, be wanting. It is the agreement, and not the law, nor the delay of payment, that will turn interest into principal. If the creditor was permitted to exact from the debtor a stipulation to pay interest on arrears of interest then due, it would lead to great and inevitable abuse. It would, perhaps, be less mischievous, because the parties would stand upon more equal terms, to allow of such a stipulation for compound interest, when the original contract is about to be made. The parties are, then, independent of each other; but, in the other case, the debtor is comparatively dependent, and probably distressed; and the creditor exacts the stipulation, under the evident advantage of power and superiority. The agreement, on the part of the defendant, to pay compound interest retrospectively, does not alter the case, for the maxim, '*volenti non fit injuria*,' does not apply in these cases." This case was followed in *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99, and the rule there announced is the one most consistent with the principles already adopted by this court for the enforcement of contracts for compound interest.

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3. The plaintiff might have protected himself by insisting upon the payment of interest when due, taking renewal notes or separate obligations for the unpaid interest, for all the cases agree that a loan is not usurious because simple interest earned at the time of the renewal is included in the new principal (*Keiser v. Decker*, 29 Neb. 92), and it was doubtless in view of the application of this rule that the district judge made the finding that, when the interest payments became due upon each of the items making up the first and second causes of action, the plaintiff and defendant entered into an agreement that the plaintiff should carry said accrued interest as separate loans, and should receive thereon interest at the rate of 10 per cent. per annum. We have examined the record, and do not think the evidence sustains this finding. At the most, the alleged agreement amounted to nothing more than an oral promise of the defendant to pay interest upon interest for an indefinite forbearance. There was no time of extension agreed upon, nor any promise made by the plaintiff which would have prevented him from beginning an action at any time to recover the interest due.

We therefore conclude that the amount of the renewal notes in excess of the principal and simple interest computed thereon at the rate of 10 per cent. per annum was without consideration, but that they are valid obligations for the amount of principal and interest which the plaintiff was entitled to recover at the date of their execution, and that there is now due to the plaintiff that amount with 10 per cent. interest from the date of the renewal to the date of the decree.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for a decree in accordance with this opinion.

JACKSON and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing

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opinion, this cause is reversed and remanded for further proceedings in accordance with the above opinion.

REVERSED.

The following opinion on rehearing was filed October 22, 1908. *Former judgment of reversal vacated and judgment of district court affirmed:*

1. **Usury.** The demanding of interest in advance, even though the highest rate of interest allowed by law is being charged, is not usury in this state, as such a course is permitted by our statute. Comp. St. 1907, ch. 44, sec. 1.
2. **Parol Contract: CONSIDERATION.** An oral agreement for forbearance, and giving time for the payment of money then due, is a sufficient consideration to support an agreement on the part of the debtor to pay interest thereon.
3. **Interest, Compounding.** Where a principal note bears the maximum rate of interest allowed by statute, interest upon interest cannot be stipulated for at the time of the loan or contract, but if, after the interest is due, an agreement is made that it shall carry interest, such an agreement is valid and will be enforced.
4. ———. And in such a case, the fact that the principal note bears the maximum rate of interest allowed by law, and that such subsequent agreement to pay interest upon interest past due also stipulates for the payment of such maximum rate of interest, is immaterial.
5. **Evidence examined, and held to sustain the findings of the district court.**

FAWCETT, C.

Our former opinion, *ante*, p. 408, contains a very full and accurate statement of the issues involved in this case. Defendants base their claim for reversal on the following grounds: "(1) That the alleged agreements between the debtor and creditor, after the interest became due, are not established by the evidence, and, if they were, they did not warrant the inclusion of this compound interest in the renewals. (2) The mortgages are usurious, but, even if they are not, the compound interest is not collectible, since the original obligations already drew the highest rate of interest allowed by law."

It is insisted by the defendants that the evidence does not show that, when the interest payments became due from time to time, the parties agreed that the past due instalments of interest should be treated as principal and thereafter draw interest at the same rate as the principal note. The trial court found against defendants on this proposition, and we are unable to say that such finding is not supported by the evidence. On the trial, defendants called Mr. Charles W. Sanford, one of the plaintiffs, as their witness. Mr. Sanford testified that he was the son of Whitfield Sanford, the payee and mortgaged named in the notes and mortgages in controversy; that he attended to substantially all of the business of his father, Whitfield Sanford; that, when defendant Lundquist was notified from time to time of the maturity of the interest coupons, he "would come in—he would come up usually about that time to see me. If he could pay me, then, whatever he could pay was paid and indorsed upon the note. If he could not pay the interest, he would ask me if I could not carry it the same as the other, and promise to pay interest and treat it as a separate loan"; that the addition of the interest, and compounding it, was at defendant's request, "rather than to pay the interest that was due"; that no interest was ever charged on anything, or demanded on any part of the transaction in controversy, which was not due at the time it was charged, "due and past due"; that no agreement was ever made between the parties that defendants should pay any more than 10 per cent. on the amount due at the end of each year, and that no more than that sum was ever charged. Mr. Lundquist in some portions of his testimony denied these statements made by Mr. Sanford, but in other portions of his testimony corroborated him. He testified: "Q. When you would come and tell him you could not pay the interest, what would he say? A. He said he would extend it and make new notes. Q. And add the interest? A. Yes." Regardless of the fact that defendants, by placing Mr. Sanford upon the stand as their witness, vouched for his veracity,

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and are bound by his testimony, he is corroborated by other facts and circumstances in the case. An attempt is made to show that Mr. Lundquist is a native of Sweden, and not well versed in the English language; but from his own testimony we gather that he moved to Saunders county in 1875, and has lived there ever since; that his son Frank, a man 29 years of age at the time of the trial in the district court, has always lived at home; that he is educated in English, in fact "has been all through the county school"; that defendant did not keep anything from him or any one in the family; that he talked about this business in the family. "Q. You did go on and talk, all of you, about it? A. Yes, sir. Q. You all knew about it? A. Yes, sir." He testified further that, when some of the mortgages in controversy were drawn, Mr. Sanford prepared them, and he took them home for the purpose of having his wife sign them, and the next day he and his wife went to Valparaiso and executed the mortgage, and that the son Frank, above referred to, went with them. It further appears from an examination of exhibit 20 that on April 2, 1903, Mr. Lundquist wrote a letter to Mr. Whitfield Sanford, in which he uses this language: "According to Charles' statement the mortgage is \$9,552, but you should at least throw off the \$552 for the big interest I have been paying, for I know of no one else who has been charging 10 per cent. on farm mortgages." This letter shows that at that time the old gentleman knew the amount which plaintiffs were demanding, yet no claim is made that he had been in any manner fraudulently or deceitfully dealt with, or that the amount claimed was not correct; nor is any claim made that he had ever paid any usury, or that he was entitled to deductions of any kind. He simply asked Mr. Sanford to "throw off" the \$552, in consideration of the fact that he had been paying 10 per cent. interest. This testimony and these facts and circumstances, together with the fact that he deliberately and without any complaint or claim of injustice executed the notes and mortgages in controversy, so strongly cor-

roborate the testimony of Mr. Sanford that we cannot say that the district court erred in finding that, "when the annual interest payment became due upon each of the items making up the first and second causes of action, the defendant Frank A. Lundquist and Charles W. Sanford, as agent for Whitfield Sanford, entered into an agreement whereby the said Sanford should receive 10 per cent. interest annually in advance upon each of said interest payments then due, and at the request of said defendant such overdue interest payments were carried by Sanford for him as separate loans, and such compound interest was charged by the said Sanford annually by agreement with the said Frank A. Lundquist, and was included in the renewals set forth in the first and second causes of action; that the said Whitfield Sanford, in fact, carried said interest loans under said agreement until they were merged in the notes and mortgages set forth in plaintiff's first and second causes of action." We must therefore hold that, as to the questions of fact involved, the findings of the district court are sustained by the evidence.

Under the facts as thus found there is, we concede, some conflict in the authorities, but we think the overwhelming weight of authority sustains the conclusion of law reached by the trial court that the notes and mortgages in controversy were valid contracts which plaintiffs were entitled to have enforced. In *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) *13, and *Van Benschooten v. Lawson*, 6 Johns. Ch. (N. Y.) *313, that eminent jurist, Chancellor Kent, announced a contrary doctrine, but we think an examination of later decisions in all the states clearly indicates that, had it not been for the eminence of Chancellor Kent, his holding in those cases would have been entirely without subsequent support. Notwithstanding his eminence, the doctrine announced by him has been repudiated in substantially every court of last resort in the land. The application of the principle announced by Mr. Chancellor Kent sustains our former opinion in this case; but a care-

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ful reconsideration of the question convinces us that the rule laid down by the learned chancellor goes too far, and that the better rule is the one now generally applied that interest upon interest cannot be stipulated for at the time of the loan or contract, but if, after the interest is due, an agreement is made that it shall carry interest, such an agreement is valid and should be enforced.

It is insisted that *Mathews v. Toogood*, 23 Neb. 536, sustains defendants' contention; but we do not so understand that case. All that that case decides is that an agreement in advance to pay interest upon interest coupons after they are due, where the principal note draws the maximum interest, will not be enforced. That is not this case. The rule announced in that case is in harmony with the holdings of many eminent courts, and is in entire harmony with our holding in this case. That an agreement to pay compound interest does not render the contract usurious is well settled in this as well as in other courts. *Weyrich v. Hobelman*, 14 Neb. 432; *Rose v. Munford*, 36 Neb. 148; *Steen v. Stretch*, 50 Neb. 572; *Otis v. Lindsey*, 10 Me. 315; *Hale v. Hale*, 1 Cold. (Tenn.) 233. In the last case, the court say: "There can be no plainer legal proposition stated, than that compound interest is not usury. In the language of the court, in *Kellogg v. Hickok*, 1 Wend. (N. Y.) 521, 'compound interest has nothing to do with the question of usury.'" In *Fobes & Adams v. Canfield*, 3 Ohio, 17, in a case similar to the one at bar, the court say: "A sum of money due for interest is as justly and fairly due as for any other consideration, and an agreement to pay interest upon it after it is due cannot be deemed usurious. * * * But if, when the interest is due and payable, and constitutes a then subsisting debt, the debtor ask to retain it, and pay interest upon the amount at the legal rate of interest, the agreement is not usurious. It is nothing more than an agreement to pay legal interest for the forbearance of enforcing the collection of a debt then actually due and demandable." In *Telford v. Garrels*, 132 Ill. 550, it is said: "Where a debtor has agreed to pay

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annual interest, and upon a settlement with his creditor consents to allow interest on such annual interest not paid when due, the transaction will not be unlawful or usurious." In *McGovern v. Union Mutual Life Ins. Co.*, 109 Ill. 151, the court say: "When interest upon a note is past due, no reason is perceived which will prevent the holder from taking a new note from the debtor for principal and interest, and make this sum bear the legal rate of interest. Such a transaction is in all respects legitimate." In *Pauling v. Creigh's Adm'rs*, 54 Ala. 646, the court say: "As a mere incident, interest on interest is not allowed or recoverable. A promise to pay it is not, however, usurious or illegal, or without consideration, and the weight of authority is, perhaps, in favor of the validity of the promise to pay it, at law, whether made at or subsequent to the original contract. 1 Am. Lead. Cases, 650. The claim to such interest is usually regarded by all the authorities as founded in justice, and a note or other security given for it, after it has accrued, will be sustained and enforced. Ib. 561. Accounts may be legally settled on the basis of such interest, and an express promise to pay the balance is valid and binding. Ib. In the case of *Eslava v. Lepretre*, 21 Ala. 504, 530, it is said: 'When interest has once accrued due, it becomes a debt. There is no longer, therefore, any objection to an agreement *inter partes*, that it shall be considered principal, and thenceforth carry interest.' " In *Gilmore v. Bissell*, 124 Ill. 488, the court say: "The addition of this amount (the interest on the past due interest) to the debt, and the agreement to pay it, it is insisted, rendered the transaction usurious. We do not concur in this view. The mortgagors had agreed to pay the interest on the mortgage debt annually, and it was their duty to observe that agreement; but they had failed to pay as the interest each year become due. When the time, however, came to renew the debt, the mortgagors had the right, if they saw proper, to redeem their agreement and pay interest on the interest; and their agreement to pay that interest was not illegal, nor did it render the

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transaction usurious. What was done was but the performance of a contract made by the parties, which they had the right to do. If authority was needed to sustain the view of the circuit and appellate courts, *Haworth v. Huling*, 87 Ill. 23, is conclusive of the question made." In *Haworth v. Huling*, referred to above, the court say: "The point made, that complainant was allowed compound interest, is not well taken. The principal debtor had agreed to pay annual interest, and on the settlement made July 11, 1865, there may have been interest allowed on annual interest maturing on the notes, and not paid when due, but that is not certain under the evidence. But, if there was, the transaction was not illegal. The mortgagor could pay interest on interest previously due on his indebtedness under his contract, if he chose." In *Gunn v. Head*, 21 Mo. 432, the court say: "The court was evidently mistaken in the notion that interest cannot bear interest. Parties cannot prospectively agree that interest may bear interest; but, after interest has accrued and is due, it may be agreed that such interest may bear interest." In *Perley*, Law of Interest (1893), p. 158, it is said: "If an agreement is made to convert interest already due and payable into principal, or if accounts between parties are settled by rests, and therefore in effect upon the principle of compound interest, it is allowed." In *Craig v. McCulloch*, 20 W. Va., 148, the court say: "When by the terms of an obligation interest is payable at stated periods, interest upon interest from the time it becomes due only gives the creditor the usual equivalent for the nonpayment of the interest at the time agreed upon; and an agreement to pay such interest simply secures to the creditor that remuneration which he could obtain by collecting such interest and loaning it to another party. In some states a recovery may be had of interest upon interest under such circumstances without a special contract to that effect. * * * With us this is not allowed. But it is definitely settled in Virginia and this state that an agreement to pay interest upon interest is valid if made after the inter-

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est which is to bear interest has become due. * * * This rule of law is, we think, sound and reasonable. Money due for interest is as justly and fairly due as for any other consideration, and an agreement to pay interest upon it, made after it is due, cannot be regarded as unreasonable or inequitable. When the interest has become due it is a debt which the creditor has the right to collect, and an action lies to recover it, although the debt on which said interest accrued may not then be due. * * * If instead of paying it the debtor asks to retain it and pay interest on it as any other debt, there can be no reasonable objection to his being permitted to do so. It is nothing more than an agreement to pay interest for the forbearance of enforcing the collection of a debt then actually due and demandable. * * * The forbearance and giving time for the payment of money then due is a sufficient consideration to support the agreement. * * * The same reason which justifies the making of such an agreement for converting interest into principal once will justify the repetition of such agreements from time to time, as often as interest shall become due by the terms of the original contract out of which the interest arises, and the right to make such an agreement is not limited to converting interest into principal once upon the same debt." To the same effect as above are the holdings in Oregon, Iowa, Connecticut, Georgia, Illinois, Maine, Michigan, Virginia, West Virginia, Kentucky, Dakota, Massachusetts, Missouri, Alabama, Ohio, Pennsylvania, South Carolina, Tennessee, and the federal courts. In fact, our attention has not been called to any recent case holding to the contrary.

In addition to what has been said, we think section 1, ch. 44, Comp. St. 1907, settles this case adversely to the contention of defendants: "Any rate of interest which may be agreed upon, not exceeding ten dollars per year upon one hundred dollars, shall be valid upon any loan or forbearance of money, goods, or things in action; which rate of interest so agreed upon may be taken yearly, or for any shorter period, or in advance, if so expressly agreed." In

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the case at bar, the principal note was clearly within the above provision of the statute. The interest upon interest in each instance was agreed to be paid by the defendants in consideration of the forbearance on the part of his creditor, and the forbearance on the part of the creditor was a good consideration for the agreement on the part of the debtor to pay the interest upon interest. Some point has been made by defendants that the agreements from time to time to pay interest were of no force and effect because they were not in writing. This contention is without merit for two reasons: First, an oral agreement to forbear collection of a debt then due will support an agreement on the part of the debtor to pay interest; second, in the case at bar the oral agreements were subsequently reduced to writing and signed and acknowledged by the defendants; so that, even if the rule contended for by defendants were sound, it could not apply in this case.

Another point is made that, even if the agreements were made as claimed, they were void, because the effect was to impose an additional burden on the homestead without the wife's consent. This contention is also without merit, for the reason that the notes and mortgages were signed by both husband and wife, and duly acknowledged by them under circumstances which show no restraint or coercion on the part of the plaintiffs. In fact, the record nowhere shows any attempt at fraud, coercion, or deception on plaintiffs' part.

The demanding of interest in advance, even though the highest rate allowed by law is being charged, is not usury in this state, as such a course is permitted by our statute. When money is due from A to B, and B, at the request of A, forbears enforcement of payment under an agreement that A will pay B interest during the period of such forbearance, it is clear that such forbearance on the part of B is a sufficient consideration for A's promise to pay interest. If such forbearance is a sufficient consideration for A's promise to pay interest, then, clearly, the contract is not against public policy or in any sense inequitable.

The finding of the district court is that the agreement between Lundquist and Sanford for the payment of interest upon interest was, in each instance made, not when the loan was originally made, but when the several payments of interest became due and payable. Being due and payable, Sanford had a perfect right to enforce payment of the interest as a liability on the part of Lundquist separate and apart from the principal debt. If Lundquist had paid this interest, Sanford could have loaned it elsewhere, or, if Lundquist had paid the interest one minute, there can be no doubt but that he could have borrowed it again the next minute from Sanford, and have given Sanford his notes therefor, bearing interest at 10 per cent. At the time the notes in suit were made Lundquist was owing Sanford certain sums of money representing the principal sum originally borrowed. He was also owing Sanford large sums of money for interest upon that principal sum, which it must be conceded were enforceable. The sum due for interest had been due for a considerable time; some of it for long enough that, unless it had been in some manner waived, Lundquist could probably have pleaded the statute of limitations in bar. Sanford had forborne enforcing payment of those instalments of interest relying upon Lundquist's oral agreement to pay 10 per cent. interest on such past due instalments of interest. It must be conceded that such oral agreement to pay interest for the forbearance of Sanford at least created a moral obligation to make the payment as agreed, and we have never understood that it is unlawful, or against public policy, for a party to reduce to writing and legally bind himself to make good a moral obligation previously incurred. We think the rule here adopted in harmony with the holdings of the many eminent courts above cited is more in the interest of the debtor than the rule announced by Chancellor Kent. To adopt the rule laid down by the learned chancellor would close the door of leniency and make the creditor insistent upon prompt payment of interest on the day of its maturity, regardless of the immediate necessities

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of his debtor; for it is a rare case where a money lender will grant forbearance without recompense.

Our present holding that interest upon interest cannot be stipulated for at the time of the loan or contract is not intended to be applied to cases where such stipulation for compound interest will not result in making such interest when so compounded exceed the maximum rate. As to such cases our former holdings are adhered to.

We recommend that the former judgment of this court be vacated and set aside, and that the judgment of the district court be in all things affirmed.

Root, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is vacated and set aside, and the judgment of the district court is in all things affirmed.

JUDGMENT ACCORDINGLY.

REESE, J., not sitting.

STATE OF NEBRASKA, APPELLEE, V. SEVERAL PARCELS OF
LAND, APPELLANT.

FILED DECEMBER 18, 1907. No. 15,003.

1. **Waters: IRRIGATION DITCHES: EXEMPTIONS.** The proviso in section 1, art. III ch. 93a, Comp. St. 1905, that "where ditches or canals have been constructed before the passage of this act of sufficient capacity to water the land thereunder for which the water taken in such ditches is appropriated, such ditches and franchises and the land subject to be watered thereby shall be exempt from the operation of this law," is for the benefit and protection of the owner of such land, as well as for the owners of such irrigation ditches.
2. ———: **IRRIGATION DISTRICTS: EXEMPTIONS.** In the organization of an irrigation district, the judgment of the county board as to those matters which are by the statute committed to its consideration, investigation and determination may not be collaterally

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attacked; but the question whether land is under a ditch already constructed of sufficient capacity to water the same is not by the statute left to the adjudication of the county board. The proviso in section 1, art. III, ch. 93a, Comp. St. 1907, expressly exempts such lands from the operation of the law.

3. ———: ———: ———. The provisions of sections 46 to 53, inclusive, art. III, ch. 93a, Comp. St. 1907, are not applicable to a case where land is, at the time of the organization of the irrigation district, under a ditch already constructed of sufficient capacity to water the same, such land being expressly exempted from the operation of said law by the proviso in section 1 of said article III.
4. **Taxation: TENDER: INTEREST.** Where a taxpayer makes a sufficient tender of payment of his general taxes, and the treasurer refuses to receive the same because said taxpayer will not also pay an invalid special tax, interest should not be charged the taxpayer in a suit brought under the scavenger law.

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Affirmed in part.*

*Hainer & Smith, Hoagland & Hoagland, J. G. Beeler
and A. Muldoon, for appellant.*

L. E. Roach, contra.

CALKINS, C.

The city of North Platte is situated between the North and South Platte rivers, a short distance west of their confluence. For a distance of some 25 miles west of North Platte the two streams flow parallel at about three to five miles apart. In 1883 the North Platte Irrigation & Land Company began the construction of a ditch to water the land located east of their intake, which was on the North Platte river, about 21 miles west of North Platte, and on May 1, 1884, they had completed their main ditch for this distance. The ditch was constructed through the south half of section 25, township 14, range 31 west, a tract lying a short distance northwest of the city of North Platte, and on the 21st day of July, in 1888, the said corporation conveyed to M. W. Walsh, the

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answering defendant herein, the said south half of this section. The grantors reserved from this conveyance a strip of land of the width necessary for the right of way of their canal, and for enlarging and repairing the same, and a right of way across said lands for lateral ditches when the same became necessary; but no right to use the water from the ditch was expressly granted by the deed. After the enactment of the irrigation statute of 1889 (laws 1889, ch. 68), the said company seems to have posted and filed the notice of appropriation required by that law. Upon the taking effect of the act of 1895 (laws 1895, ch. 69, Comp. St. 1895, ch. 93a, art. II), and on the 2d day of July, 1895, the company filed a claim with the secretary of the state board of irrigation for the appropriation of water to irrigate the lands in question amongst other lands, which was afterwards, and on the 6th day of September, 1898, allowed. In 1896 the Suburban Irrigation District was formed under the provisions of ch. 70, laws of 1895 (Comp. St. 1895, ch. 93a, art. III), and there was included in its boundaries the said south half of section 25, township 14, range 31. The order of the county board establishing such district was made on the 2d day of May, 1896, and, the district having issued bonds, a petition was afterwards filed in the district court for a judicial examination of the proceedings for the organization of said district under the provisions of sections 59 to 63, inclusive, of said chapter; and a decree was rendered approving said proceedings, and declaring them legal in all respects, on the 5th day of August, 1896. The directors of said Suburban Irrigation District proceeded to levy taxes upon the said land, which were certified to the county treasurer, so that there were charged against the same upon the tax list of the county treasurer for the years 1896 to 1904, inclusive, taxes amounting to about the sum of \$1,700, in addition to the taxes levied against said land for general purposes. The defendant Walsh had tendered payment of the general state and county taxes, but the county treasurer had re-

fused to receive the same, unless he would also pay the taxes levied by the irrigation district. After the enactment of the statute of 1903 (Comp. St. 1903, ch. 77, art. IX), commonly known as the "scavenger law," these taxes being unpaid, this action was begun to enforce their collection. The defendant Walsh answered, alleging the tender of the state and county taxes; that his land was under the canal of the North Platte Irrigation & Land Company; and that said canal was constructed before the passage of the act of 1903, and was of sufficient capacity to irrigate said land. He also challenged the regularity of the proceedings organizing the Suburban Irrigation District. The irrigation district was thereupon made party, and issues framed between it and the defendant Walsh. Upon a trial of these issues, the court found that the Suburban Irrigation District was duly organized, that the taxes levied by it were a valid lien, and rendered judgment for the same and for the principal of the state and county taxes, without interest. From so much of the judgment as related to the irrigation taxes the defendant Walsh appeals, and the state has filed a cross-appeal from so much of said judgment as refused to give interest upon the state and county taxes.

1. Before the enactment of the district irrigation law, the irrigation of land had been developed to a considerable extent by means of canals constructed by private parties or corporations organized for that purpose; but up to that time there had been no authority to form irrigation districts and levy taxes upon the land embraced therein for the purpose of constructing and maintaining irrigating ditches. The purpose of the district irrigation law was obviously to provide the means of reclaiming arid land for which up to that time water had not been available. It would have been clearly unjust for the legislature to permit these districts to be organized to include land already reclaimed, except in cases where the purpose of forming the district was to purchase or take over an irrigation system already existing; and to prevent this

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injustice there was inserted in the first section of the act the following: "Provided, that where ditches or canals have been constructed before the passage of this act of sufficient capacity to water the land thereunder for which the water taken in such ditches is appropriated, such ditches and franchises and the land subject to be watered thereby shall be exempt from the operation of this law except such district shall be formed to make purchase of such ditches, canals and franchises, and that this law shall not be construed to in any way affect the rights of ditches already constructed." Laws 1905, ch. 165. It is contended on behalf of the irrigation district that this provision is for the benefit, not of the landowner, but for the protection of the owners of ditches and canals in existence at the time of the organization of such district, and that the North Platte Irrigation & Land Company had waived the benefit of this protection. We cannot agree to this construction of the statute. It is that "*such ditches and franchises and the land subject to be watered thereby shall be exempt from the operation of this law.*" Such a construction would eliminate the words quoted in italics, and no reason is given why they should be disregarded. On the other hand, the reason they were inserted is obvious. In an arid country the construction of a ditch enhances the value of the land lying thereunder and subject to be watered thereby; and to treat such land as being unprovided with irrigation, and impose upon it the expense of a second reclamation, is to deprive the owner of such increment in value. If irrigation is a benefit, and the only justification of the district irrigation law rests upon the assumption that it is, then this land was made more valuable by reason of its being subject to be watered by the ditch of the said North Platte Irrigation & Land Company. The defendant Walsh appears to have purchased his land from this irrigation company. It is shown by the evidence that the land is under its ditch; that it is practicable to irrigate the same therefrom, and that the company had sufficient water which it was will-

ing to furnish for that purpose at all times up to the time of the trial. Where land owned by an irrigation company is reclaimed from its arid state, it is usually sold for a higher price, and this increase of price is one of the inducements toward such reclamation, and we may safely presume that the defendant, or any person who purchased lands of this irrigation company, paid a higher price than would have been charged but for such reclamation. We are therefore satisfied that his land should not have been included in the boundaries of the Suburban Irrigation District in the first instance.

2. It is, however, contended that the county board had jurisdiction, and that its determination cannot be attacked in this proceeding. It must be conceded that, as to those matters which were by the statute committed to the consideration, investigation and determination of the county board, its judgment should not be collaterally attacked; but the question here is: Was it left to the county board to decide whether this land was under a ditch constructed prior to that time and of sufficient capacity to water the same? A similar question, arising under the same statute, has once been before this court. Sections 47 to 54, inclusive, of the same act provide for proceedings by means of which land may be excluded from an irrigation district; and section 49 contains the proviso that in no case shall any land be held in any district or taxed for irrigation purposes which cannot, from any natural cause, be irrigated thereby. This clause was construed in *Andrews v. Lillian Irrigation District*, 66 Neb. 461. In this case it was alleged that the plaintiffs were the owners of certain lands lying within the boundaries of the irrigation district, which were low, wet, swampy lands and totally unfit for irrigation, and which needed to be drained before they could be farmed. Observing that it is provided under section 2 that no lands shall be included in the district that would not in the opinion of the board be benefited by irrigation therefrom, the court declares that the question whether a particular

tract of land will be benefited by a proposed system of irrigation is exclusively for the county board, and that its conclusion cannot be attacked in a collateral proceeding. Considering the proviso in section 49 the court say: "As already shown, whether a particular tract of land will be benefited by a proposed system of irrigation is a question which the legislature has confided to the county board. Whether a particular tract of land from some natural cause cannot be irrigated is a question which goes to the jurisdiction of the county board over such tract and may be raised at any time in a proper case, because section 49, *supra*, expressly denies the jurisdiction of the county board to include such land in an irrigation district, or to tax it for irrigation purposes." The reasoning of this case applies to the question we are considering. If the provision that land which cannot, from any natural cause, be irrigated by a ditch excludes it from the jurisdiction of the county board, certainly the provision that land subject to be watered by a ditch constructed before the passage of the act and of sufficient capacity to water the same shall be exempt from the operation of the law would prevent the county board from passing upon and determining this question. If the section in question had said that, where ditches or canals have been constructed before the passage of the act of sufficient capacity to water the land thereunder, for which the water taken in such ditches is appropriated, such ditches and franchises and the land subject to be watered thereby shall not be held by any district or taxed for irrigation purposes, we would have had precisely the same question as was presented in *Andrews v. Lillian Irrigation District*, *supra*. The exclusion in section 1 is more radical and fundamental than that in section 49. It is that the lands described shall be exempt from the operation of the law; and it is only by the operation of the law that the county board can claim jurisdiction. Without this statute, from which this land is expressly made exempt, neither the county board which made the order, nor the district court which afterwards examined it,

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had any jurisdiction whatever. Their jurisdiction arose by operation of this statute. The defendant's land was expressly and by the plain and unequivocal language of the statute exempted from its operation.

3. It is contended on behalf of the irrigation district that, if the lands of the defendant Walsh were wrongfully included in the district, he had a plain statutory remedy under sections 46 to 53, inclusive, of the act. We have already seen that under the rule in *Andrews v. Lillian Irrigation District*, *supra*, the express exclusion of authority negatives the jurisdiction of the county board. The claim made on behalf of the irrigation company is untenable for another reason. In the proceeding provided for in the sections above referred to there is no authority to inquire concerning, nor to determine, the fact whether the lands sought to be excluded were under another ditch of sufficient capacity to water the same before the enactment of the law. The only provision contained in these sections, as to what shall be cause for excluding the land, is that, if the directors deem it for the best interests of the district that the land mentioned in the petition, or some portion thereof, shall not be excluded, they shall deny the petition.

4. The conclusion at which we have arrived in reference to the validity of the taxes levied for irrigation purposes disposes of the appeal of the state from the decision of the district judge that the tender of the state and county taxes relieved the defendant Walsh from the liability to pay interest on the same. Whatever may be the rule where a taxpayer tenders his general taxes, but refuses to pay a special tax which is valid, it is perfectly clear that, where the special tax which he refuses to pay is invalid, and he tenders all the legal taxes, such tender should relieve him from the payment of interest.

We therefore recommend that the judgment of the district court be affirmed as to the state, county and general taxes, and reversed as to the taxes levied for irrigation purposes; and that the district court be directed to enter a decree that the latter are void and not a lien upon the land in question.

FAWCETT and AMES, CC., concur.

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By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed as to the state, county and general taxes, and reversed as to the taxes levied for irrigation purposes; and the said court is directed to enter a decree that the latter are void and not a lien upon the land in question.

JUDGMENT ACCORDINGLY.

JOHN A. LUTHER V. STATE OF NEBRASKA.*

FILED DECEMBER 18, 1907. No. 15,188.

Intoxicating Liquors: KEEPING FOR SALE: QUESTION FOR JURY. The provisions of chapter 50, Comp. St. 1907, apply only to intoxicating liquors; and when a defendant charged with the offense of selling or keeping for sale without license "malt and intoxicating liquor, to wit, Malt Tonic," introduces evidence tending to show that the liquor actually sold and kept for sale by him was not intoxicating, he is entitled to have the question whether such liquor was in fact intoxicating submitted to the jury.

ERROR to the district court for Harlan county: ED. L. ADAMS, JUDGE. *Reversed.*

M. H. Weiss and Berge, Morning & Ledwith, for plaintiff in error.

W. T. Thompson, Attorney General, and Grant G. Martin, contra.

CALKINS, C.

This was a prosecution for the unlawful keeping and sale of liquors without license. The first count of the information charged the defendant with unlawfully keeping for sale, and the four following counts with unlawfully selling what was in each instance described as a certain "malt and intoxicating liquor, to wit, Malt Tonic." The

* Judgment of district court affirmed February 20, 1909.

trial resulted in a verdict of guilty upon all the counts, and the defendant, having been sentenced to pay a fine upon each, brings error from such judgment.

1. There was evidence tending to show that the liquor actually sold was not intoxicating; but the court in the instructions given on its own motion told the jury that the defendant was charged with selling malt liquors, omitting the word intoxicating in each instance. Under these circumstances the defendant requested the following instructions: "(1) The court instructs the jury that one of the material allegations of the complaint is that the defendant sold malt and intoxicating liquors, and that the state must prove said allegations beyond any reason of doubt before you would be justified in finding the defendant guilty of any one of the last four counts; that, unless you find from the evidence beyond any reason of doubt that the said Malt Tonic is intoxicating, you should acquit the defendant of said counts. (2) The court instructs the jury that in the first count the defendant is charged with keeping for sale certain malt and intoxicating liquors, to wit, Malt Tonic; that before you would be justified in finding the defendant guilty on said count it is incumbent upon the state to prove beyond any reasonable doubt that the said Malt Tonic is intoxicating; that, if the state fails to prove that said Malt Tonic is intoxicating, it is your duty to acquit the defendant on said count." This request was refused, and such refusal is assigned as error. There is therefore presented the single point, should the court have submitted to the jury the question whether the liquor shown to have been kept for sale or sold by defendant was intoxicating?

The learned counsel for the state contends that the statute forbids the sale or keeping for sale of malt liquors without license, regardless of whether they are or are not in fact intoxicating, though they admit that the intoxicating properties of the liquor might be considered for the purpose of ascertaining whether or not it was a malt

liquor. Section 11, ch. 50, Comp. St. 1907, upon which the charge of unlawfully selling is founded, provides that all persons who sell or give away upon any pretext "malt, spirituous or vinous liquors or any intoxicating drinks" without license shall be deemed guilty, etc. If this clause be read with the emphasis upon the word "any," it would appear that the legislature regarded malt, spirituous or vinous liquors as intoxicating, and intended by the words "or any intoxicating drinks" to include such intoxicating liquors as would not be embraced in the terms "malt, spirituous or vinous"; while by placing the emphasis on the word "intoxicating," it would appear that it was intended to describe malt, spirituous or vinous liquors as nonintoxicating, and to prohibit their sale, together with that of intoxicating drinks. The supposition that the legislature did not regard malt, spirituous or vinous liquors as intoxicating is incredible, and any interpretation founded upon such an assumption cannot be adopted. It is plain that the words "malt, spirituous or vinous liquors" were not used in opposition to, but synthetically with, the words "intoxicating drinks," and that this section should be construed as if it read "malt, spirituous or vinous liquors or any *other* intoxicating drinks." Section 20, under which the first count of the information in this case is framed, first makes it unlawful to keep for sale without license malt, spirituous or vinous liquors; then, dropping the term "malt, spirituous or vinous liquors," it provides that any person found in the possession of any intoxicating liquor with intent to dispose of the same without license shall be guilty of a misdemeanor; and, when it comes to prescribing the procedure, it provides for a complaint to be made that intoxicating liquor is kept for sale. This section cannot be enforced without construing the term "malt, spirituous or vinous liquors" as being used interchangeably with and meaning the same as "intoxicating liquors." It is hardly necessary to go further; but an examination of the other sections of the chapter in question shows that the words "malt, spirituous or vinous liquor," "liquors,"

"intoxicating liquors," and "intoxicating drinks" are used interchangeably throughout. There can therefore be no question that the malt liquor mentioned in the sections above quoted is an intoxicating malt liquor; and the defendant, having introduced evidence tending to show that the liquor kept and sold by him was not in fact intoxicating, had the right to have that question submitted to the decision of the jury. If it be urged that there are no non-intoxicating malt liquors, the defendant had the right to prove that the liquors kept and sold by him were nonintoxicating, for the purpose of showing that they were not malt liquors; and, having introduced testimony tending to support that theory, he had the right to have it submitted to the consideration of the jury.

This case does not involve the question whether it is sufficient in an information to charge the sale or keeping of malt liquors without the allegation that the same are intoxicating; and the cases cited to support the proposition that such an information would be sufficient are not in point. Neither is the question here presented whether the legislature might forbid the sale of harmless and non-intoxicating malt liquors, if such there be, for it has not yet attempted so to do, and it is not necessary for us to consider the cases cited for and against this proposition. In this state, legislative restriction of the sale of liquors has so far been directed to those which cause intoxication, and its attendant train of misery, vice and crime.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
AT
JANUARY TERM, 1908.

FRANK BARKER V. STATE OF NEBRASKA.

FILED JANUARY 8, 1908. No. 15,546.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Francis G. Hamer and T. F. Hamer, for plaintiff in error.

W. T. Thompson, Attorney General, and Grant G. Martin, contra.

PER CURIAM.

It appearing from the record affirmatively that the judge of the district court for Lancaster county has proceeded in all things in accordance with the statute providing for the investigation as to the sanity of a convict under sentence of death, the order entered and the proceeding of said judge therein are in all things

AFFIRMED.

MARSHALL WEBB, APPELLEE, V. ROSINA WHEELER,
APPELLANT.

FILED JANUARY 8, 1908. No. 14,811.

1. **Covenants: BREACH.** A covenant in a deed that "I hold said premises by good and perfect title," if untrue, is broken when made, and right of action at once accrues thereon.
2. ———: ———: **RECOVERY FOR IMPROVEMENTS.** When the plaintiff is in possession of the premises and can recover the value of his improvements under the "occupying claimant's act," he cannot recover the value thereof in such action for damages.

APPEAL from the district court for Nemaha county:
JOHN B. RAPER, JUDGE. *Reversed.*

Stull & Hawrby and *H. A. Lambert*, for appellant.

Neal & Quackenbush, *contra.*

SEDGWICK, C. J.

Three important questions are presented in this case. Two of them have been very much discussed by the courts of the country generally, and the authorities are somewhat at variance thereon. In the decisions of this court there appears to be a diversity of expression at least, and perhaps it may be said a conflict in principle. The real estate in controversy was conveyed to this defendant by a deed with general covenants of warranty executed jointly by one Emma Carse, widow of Henry Carse, deceased, and her daughter, Alice V. McCandless, the husband of Mrs. McCandless joining also in the deed. Henry Carse in his lifetime was the owner of the premises and had good title thereto. The said deed to this defendant recited that the grantors were the heirs of Henry Carse. The defendant conveyed the land to this plaintiff, the deed of conveyance containing covenants of title and warranty. Afterwards the plaintiff discovered that Mrs. Carse and her daughter were not the only heirs of Henry Carse; that an adopted

child was an equal heir with Mrs. McCandless, and so the title conveyed to the defendant, and by her conveyed to this plaintiff, was an undivided one-half interest in the land, together with the widow's dower estate. Upon discovering this defect in the title the plaintiff brought this action. The plaintiff took possession of the land under his deed and had not been disturbed in his possession when this action was begun. The two important questions above referred to which arise upon these facts are: First, can an action be maintained for damages for breach of covenant of title to real estate before eviction, and in such case what is the measure of damages? A further question also arises in the case in determining the measure of damages from a consideration of the following facts. The defendant made lasting improvements upon the property in good faith while she held, as she supposed, full title to the property, and also the plaintiff, after he received his warranty deed from the defendant and went into possession of the property, made lasting and valuable improvements thereon. Should the value of these improvements, both those made by the plaintiff and by the defendant, be taken into consideration in determining the amount of plaintiff's damages?

1. The decisions of this court are not as clear and satisfactory as might be wished upon the first question above suggested. It seems to be conceded in the briefs that all of the courts of this country, including the supreme court of the United States, but excepting the courts of Ohio, Wisconsin and Nebraska, hold that a covenant in a deed that the grantor has perfect title is broken when made if the title is not perfect, and that an action at once accrues thereon for damages. In Ohio it is held "that a seizin in fact of the grantor at the time the deed was executed is a sufficient compliance with the covenant of seizin in the deed." In this holding it would appear that the word "seizin" is construed to mean a claim of title accompanied with possession, and therefore in Ohio under a covenant of seizin an action cannot be maintained for damages on

account of failure of title if the grantee is in undisputed possession of the premises. In *Scott v. Twiss*, 4 Neb. 133, Mr. Justice MAXWELL adopted this principle and declared it to be the law of this state. It is plain that in this opinion the word seizin was understood as in the Ohio case. A covenant for seizin, then, only meant that the covenantor was in peaceable possession of the premises under a claim of right and covenanted that the same estate was transferred to the grantee. Of course, the covenant that the grantee should have peaceable possession under a claim of right was not broken until that possession was terminated, and under such a covenant it does not seem to have been necessary to have discussed the common law rules of conveyance, except so far as it was necessary to determine the meaning of the word seizin, and of the covenant in which that word was used. Perhaps the real difference between the Ohio court and the supreme court of the United States and other courts of this country is in the force and effect given by construction to the various covenants considered. It would seem reasonable to say that the spirit of our law which deals with the substantial rights of parties, rather than with antiquated forms, would require the courts to inquire as to the real meaning of the covenant involved and being construed. What did the grantor agree to do? Has he broken that agreement? If he has, what actual damage has he caused to the grantee by so doing? A satisfactory answer to these questions ought to dispose of the case. If in framing his covenants the grantor sees fit to use the word seizin or other technical terms, it is reasonable to suppose that he intended that the recognized technical meaning of such expressions should be given them in construing his contract, and so in *Scott v. Twiss*, *supra*, the grantor having agreed to protect the grantee in his seizin of the premises, the court assumed that his covenant was not broken as long as the grantee obtained that which it is there agreed for him to have, to wit, the seizin (possession with claim of right) of the premises. Perhaps all courts do not agree

in this definition of the word seizin, but when the word is so defined, as it appears to have been in *Scott v. Twiss*, then the conclusion reached upon this point in that case is unavoidable. In *Cheney v. Straube*, 35 Neb. 521, the rule was announced in this language: "A cause of action on a covenant of warranty, or for a quiet enjoyment, does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title." The language of the covenant sued upon in this case was: "And I covenant to warrant and defend the said premises against lawful claims of all persons whomsoever." And the court said: "This covenant is considered to be tantamount to that for quiet enjoyment, and what will amount to a breach of the latter is also a breach of the former." With this construction of the meaning of the covenant there can be no doubt of the correctness of the conclusion. If the agreement of the grantor with the grantee was that the grantee should remain in quiet enjoyment of the premises, that agreement would not be broken until the grantee was deprived of possession. In *Hampton v. Webster*, 56 Neb. 628, the second paragraph of the syllabus is as follows: "In an action to recover damages for breach of covenants of warranty of title it is essential to allege in the petition that plaintiff has been evicted by title paramount." Substantially the same language is used in *Troxell v. Stevens*, 57 Neb. 329. The language of the covenant involved is not stated in either of these opinions; but, as *Real v. Hollister*, 20 Neb. 112, is cited as authority in both of these cases, it is presumed that the covenant was in the language discussed in that case. The covenant there discussed was: "They do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever." And the court said that this is equivalent to a covenant for quiet enjoyment. The distinction may, perhaps, be a little fine, and yet it will be noticed that the covenant is to defend the title against the claims of other people, and not that the grantor had a good and perfect title at the time that he made the conveyance. Under a

covenant to defend it may well be urged that the covenantor was entitled to an opportunity to defend before he should be called upon to respond in damages. The court, however, upon the point under discussion in the case last named, quoted the following language from Mr. Greenleaf: "The covenant for *quiet enjoyment* goes to the possession, and not to the title; and, therefore, to prove a breach, it is ordinarily necessary to give evidence of an entry upon the grantee, or of expulsion from, or some actual disturbance in the possession; and this, too, by reason of some adverse right existing at the time of making the covenant, and not of one subsequently acquired." 2 Greenleaf, Evidence (16th ed.), sec. 243. He also quoted from Mr. Chancellor Kent as follows: "But the covenant of warranty and the covenant for quiet enjoyment are prospective, and an actual ouster or eviction is necessary to constitute a breach of them." 4 Kent, Commentaries, p. *471. From this last quotation it appears that formerly, when the word "warranty" was used without other qualification, it had a prospective meaning; that is, it was construed to mean that the grantor agreed to defend the rights of the grantee in the property conveyed, and should only be called upon to respond in damages when he had failed to make good such defense. In 8 Am. & Eng. Ency. Law, p. 90, note 1, it is said: "In Nebraska the Ohio doctrine was followed in *Scott v. Twiss*, 4 Neb. 133, but discarded, without notice of that case, in *Real v. Hollister*, 20 Neb. 112." This statement seems to be hardly warranted from a careful comparison of the two decisions, if the distinction between a covenant for quiet enjoyment and a covenant that the grantor then has perfect title and right to convey is considered.

In the case at bar, the covenant contained four express promises: "That I hold said premises by good and perfect title; that I have good right and lawful authority to sell and convey the same; that they are free and clear of all liens and incumbrances whatsoever; and I covenant to warrant and defend the said premises against the lawful

claims of all persons whomsoever." The last promise is undoubtedly the form of covenant considered in the cases of *Real v. Hollister*, *Hampton v. Webster*, and *Trorell v. Sterens*, *supra*. Such a covenant is not broken until the covenantor fails to defend the premises against the lawful claims of other persons, and there is some reason for saying, as was said by Judge COBB in *Real v. Hollister*, *supra*, that such a covenant is construed to be a covenant for quiet enjoyment. But there appears to be no reason whatever for so construing the covenant "that I hold such premises by good and perfect title." If this covenant is not broken when it is made, in case the title is not good and perfect, then it cannot be broken by dispossessing the covenantee. We see no reason to resort to the technicalities of the rules of common law conveyancing to ascertain the meaning of a contract couched in ordinary, simple language, as is this covenant. No technical words are used, and the rule of the code that common words are to be used in their ordinary sense is applicable. Very many of the cases from which it is commonly supposed that there is an irreconcilable conflict of authorities upon this question involved the construction of contracts to convey. When the contract is to execute a conveyance with the usual covenants of warranty, or with the usual covenants of seizin, or like expressions, and contains no other language from which it can be determined in what sense these expressions are used, it becomes necessary to consider the technical meaning of such expressions, and the courts of different jurisdictions have under such circumstances declared the general expression "with usual covenants of seizin," or "with usual covenants of warranty," to be generally understood in the locality where they are used as having a certain specified meaning, and it is not surprising that under such circumstances varying meanings should be given in different jurisdictions to the same form of words. But, when the contract to convey or the deed that has been executed in pursuance thereof contains covenants in such plain language as to leave no doubt of their

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meaning, there can be no necessity for a resort to conflicting authorities. The petition in this case alleged all of these four covenants and alleged the breach thereof. The proof failed to show that the covenant "to warrant and defend the premises against the lawful claims of all persons whomsoever," that is, the covenant for peaceable possession and quiet enjoyment, had been broken. The plaintiff was still in undisturbed possession of the land. But the proof showed beyond question that the covenant that the grantor held "said premises by good and perfect title" was broken when made. The grantor did not then have a good and perfect title, and there can be no reason for refusing the plaintiff his action to recover his damages caused by the breach of this covenant as soon as he ascertained the facts.

2. The second question as to the measure of damages in such case has also been much discussed and presents some difficulty. More than a century and a quarter ago the courts of England established the principle that upon a contract for the purchase of real estate, if the vendor, without fraud, is incapable of making a good title, the purchaser is not entitled to any compensation for the loss of his bargain. *Flureau v. Thornhill*, 2 Wm. Bl. (Eng.) *1078. This case appears to have been generally followed in England since that time, and the questions discussed in regard to it have been as to exceptions to the rule. A discussion of this matter may be found in a somewhat extensive note to *Kirkpatrick v. Downing*, 17 Am. Rep. 678 (58 Mo. 32). In the principal case the Missouri court discusses the matter somewhat at length, and referring to the authorities in this country and after quoting from the opinion of the supreme court of the United States in *Hopkins v. Lee*, 6 Wheat. *109, which it appears to follow, the Missouri court said: "The rule (of the United States court) commends itself for its intrinsic justice. It conforms to the varying circumstances of each particular case, and is equitable and just. The arbitrary and unbending rule that the purchase money and interest shall in all

cases be taken as the criterion of damages will, in the majority of instances, do injustice either to the seller or purchaser. No reason is perceived why it should be adhered to and enforced, when one more consistent with equity is found, and which is easily administered. The rule for which we contend is just to both parties. It gives to the purchaser precisely what he has lost in consequence of the breach of contract committed by his vendor, and it makes the latter responsible for the violation of his agreement in the full amount to which he has occasioned injury." In *Beck v. Staats*, p. 482, *post*, the law is said to be in this state: "The measure of damages for the breach by the vendor of an executory contract for the conveyance of real estate, where the breach is caused either from the refusal or the inability of the vendor acting in good faith, is the difference between the value of the land at the time of the breach and the price he contracted to receive, and in addition thereto the vendee may recover the amount advanced upon the purchase price." The opinion in the case was carefully prepared by Mr. Commissioner EPPERSON, and we feel satisfied with the conclusion reached. It is shown in that opinion that this court is thoroughly committed to the doctrine there announced by a long line of decisions. We cannot perceive any basis for a different rule as to the measure of damages upon a breach of covenant that the grantor has good title and the measure of damages upon a breach of a contract to convey and give such title. The court of errors and appeals of New Jersey in *Gerbert v. Trustees*, 59 N. J. Law, 160, 59 Am. St. Rep. 578, speaking of this question, said: "The injury in both cases is the same—the loss of the property, the loss of such profit as would have been incident to increased value. The loss in both cases arises from the breach of the vendor's covenant on account of the defect in his title. There can, therefore, be no solid basis for diversity in the rule of damages applicable to the two conditions, and the rule should be unified if there is no serious obstacle in the way." And it is equally clear that,

while there is some diversity in the language used in the various opinions, this court is thoroughly committed to the rule of damages that is announced in *Beck v. Staats, supra*, in the cases arising upon contracts to convey real estate.

We think that whether we are bound by the earlier decisions of this court to observe a different rule in the case of breach of a similar covenant in a deed of conveyance it is unnecessary now to discuss, further than to illustrate the rule that should be applied to a case like the one at bar. In this case there was not an entire failure of title. The plaintiff contended, and the trial court appears to have held, as stated in 11 Cyc. 1163, that, "where the breach is only as to an aliquot and undivided part of the land attempted to be conveyed, the damages are in proportion to the whole consideration paid as that aliquot part of the land is to the whole thereof." We think that, in any view of the proper measure of damages in ordinary cases of the breach of such covenants, the rule above quoted, if correct (which we do not decide), has not been properly applied in this case. After the defendant had obtained her title from Mrs. Carse she put valuable and lasting improvements upon the land, and this plaintiff has also made valuable improvements as before stated. Under our occupying claimant's act this plaintiff could not be deprived of the land without payment for the improvements made both by himself and by his grantor who held under the same title. What, then, could the adopted child of Mr. Carse, whose interest in the land has not been conveyed, claim in this land? The failure of title which this plaintiff obtained through his deed is only as to the interest of this adopted child. It is true that, in an action like this for damages for a breach of covenant of title, difficulties and uncertainties are involved as to the real value of the interest in the land not conveyed to this plaintiff in his deed. These difficulties and uncertainties the plaintiff himself has brought to the court, by not first bringing an action to determine and have adjudicated the

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interest involved in the outstanding title; and he should not be allowed in this action to recover the value, or any part of the value, of those improvements that were placed upon these premises by himself or his grantor, since he cannot be deprived of those improvements through this outstanding title, and therefore has not lost the value thereof through this defect in his title. The measure of his damages in this case, then, is the value of the outstanding title at the time that the plaintiff obtained his deed—that interest in the land of which he might be deprived through this outstanding title.

The plaintiff insists that this issue is not presented in the pleadings, but we think that this objection is not well taken. The plaintiff in his petition alleged: "That after the purchase of said premises from said defendant, and prior to plaintiff's knowledge of said defect in the title and the interest of said Avis Darleen Carse in and to said premises, the plaintiff had expended in permanent improvements and betterments on said premises the sum of \$350." The answer was a general denial. The court allowed the plaintiff to recover one-half of the improvements placed thereon by himself. This he was not entitled to on any theory of the rule of measure of damages in such case. The plaintiff, being still in possession of the land and in use of these improvements, has not lost the value thereof through the defect in his title.

The judgment of the district court is therefore reversed and the cause remanded.

REVERSED.

GEORGE W. HOLMES, APPELLANT, v. NANCY E. MASON
ET AL., APPELLEES.*

FILED JANUARY 8, 1908. No. 15,060.

1. **Homestead, Administrator's Sale of.** A homestead of less value than \$2,000 cannot be disposed of at administrator's sale, either for the discharge of incumbrances thereon, or for the payment of debts against the estate of the decedent; and a sale of the homestead under a license granted by the district court purporting to authorize such a sale is absolutely void.
2. **Limitation of Actions: SALE OF HOMESTEAD: SUIT BY HEIR.** The provisions of section 117, ch. 23, Comp. St. 1907, apply to irregular administrative sales, but not to sales that are absolutely void; and an action by an heir to quiet his title to the homestead of his ancestor may be maintained at any time within ten years after his right of action accrues, or the attainment of his majority.
3. **Constitutional Law: HOMESTEAD ACT.** Section 17 of the act of February 26, 1879 (laws 1879, p. 61), commonly called the "homestead law," does not conflict with the provisions of the constitution, and the act as a whole is a valid exercise of legislative power.

APPEAL from the district court for Harlan county: ED
L. ADAMS, JUDGE. *Reversed in part.*

Field, Ricketts & Ricketts, for appellant.

J. G. Thompson, contra.

BARNES, J.

The plaintiff commenced this action in the district court for Harlan county to quiet his title to the northwest quarter of section 17, town 2, range 18, situated in said county. The defendant Nancy E. Mason answered by way of cross-petition, claiming a life estate therein, and prayed for an accounting of the rents and profits, and for possession during the remainder of her natural life. The other defendants filed cross-petitions, alleging ownership in fee,

* Rehearing denied. See opinion, p. 454, *post*.

subject to the life estate of their codefendant, and prayed for a decree quieting their title. The trial resulted in a judgment by which the plaintiff was given the life estate of the first-named defendant. The other defendants were adjudged to be the owners of the fee. Their title was quieted, and they were awarded possession after the extinguishment of the life estate. The plaintiff appealed, and presents, as we shall presently see, two main questions for our determination.

The facts established by the record, and which are not in dispute, may be briefly stated as follows: On or about the 29th day of October, 1881, William B. Mason died intestate in Harlan county. At that time he owned the premises above described in fee, subject to a mortgage of \$300, together with other lands situated in said county. For many years prior to his death he, together with his wife and children (the defendants herein), had occupied the land in question as their homestead, and were so occupying it at that time. Shortly after his death the widow, the defendant Nancy E. Mason, was appointed administratrix of his estate; and in September, 1882, she applied to the district court for Harlan county for a license to sell all of the real estate of her intestate for the payment of his debts. License was granted, and in pursuance thereto, on or about the 14th day of April, 1883, she sold it all subject to the mortgages thereon, and took a bond from the purchasers conditioned for their payment. The sale was confirmed on the 11th day of June, 1883, and deeds were made to the purchasers. The land in controversy, the homestead above mentioned, was sold to one S. B. Turner, who took possession of it; and the plaintiff, George W. Holmes, now claims and holds the same by mesne conveyances. From the 11th day of June, 1883, until the 8th day of January, 1906, when this action was commenced, the plaintiff and his grantors held the open, notorious and undisputed possession of the premises under claim of title. At the time the license was granted and the sale made to

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Turner, the homestead was worth less than \$2,000. When this action was commenced, three of the defendants, Ida E. Rowley, Henry L. Mason and Effie I. Harroun, were more than ten years past their majority, while the other defendants, when their cross-petitions were filed, were a little less than ten years past that age.

The first question presented for our consideration is the effect of the statute of limitations as applied to the cross-actions of the defendants. Under this head, the plaintiff's first contention is that the bar of the statute was complete as to those defendants who were more than ten years past their majority when this action was commenced. Section 57, ch. 73, Comp. St. 1907, provides: "That an action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate." By section 59 it is provided: "Any person or persons having an interest in remainder or reversion in real estate shall be entitled to all the rights and benefits of this act." The trial court having held that the plaintiff was the owner of the life estate of the defendant Nancy E. Mason, and no complaint having been made as to the correctness of that part of the decree, it follows that as against him a possessory action cannot now be maintained, and defendants were compelled to proceed, if at all, under the provisions of section 59 to have their remainder established and their title thereto quieted; and such is the form of their cross-actions. It is provided by section 6 of the code: "An action for the recovery of the title or possession of lands, tenements or hereditaments, can only be brought within ten years after the cause of such action shall have accrued."

The statute of limitations as to each of the several defendants commenced to run when he arrived at his majority. So as to the defendants who were more than ten

years past their majority at the time this action was commenced the bar of the statute of limitations was complete. Therefore so much of the decree of the trial court as granted any relief to those defendants was erroneous. As to them the action should have been dismissed, and the title to three-fifths of the land in controversy should have been quieted in the plaintiff. *Foree v. Stubbs*, 41 Neb. 271; *Hall v. Hooper*, 47 Neb. 111; *First Nat. Bank v. Pilger*, 78 Neb. 162; *Lyons v. Carr*, 77 Neb. 883; *Hobson v. Huxtable*, 79 Neb. 334.

As to the other defendants, plaintiff contends that as they were more than five years past their majority when they filed their cross-petitions their cross-actions were also barred by the provisions of section 117, ch. 23, Comp. St. 1907, which reads in part as follows: "No action for the recovery of any estate sold by an executor or administrator, under the provisions of this subdivision, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within five years next after the sale." In view of our former decisions the plaintiff's contention on this point cannot be sustained. In *Brandon v. Jensen*, 74 Neb. 569, after an exhaustive review of the authorities, it was held: "The provisions of section 117, ch. 23, Comp. St. 1903, apply to irregular administrative sales, but not to sales that are absolutely void." We are satisfied with the reasoning of that case, and the rule there announced has since been followed and affirmed, in substance, in *First Nat. Bank v. Pilger* and *Lyon v. Carr*, *supra*. Plaintiff insists, however, that the sale in this case was not void, and attacks our former decisions on that question. He argues that the court was not without jurisdiction of the subject matter, and therefore the order granting the license to sell the homestead was not void, but was voidable only. In some of our former decisions it is said: "The order granting the license to sell the homestead was void for want of jurisdiction." This statement is vigorously assailed, and perhaps a more accurate expression should

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have been used. It is true that the district court has jurisdiction of an action or application by an administrator to sell the lands of his intestate for the payment of his debts. But it is equally true that the sale of the homestead of a deceased person for that purpose is positively inhibited by statute; and so, while the court has jurisdiction of the subject matter, it has no jurisdiction over the homestead, and therefore it has no power to order its sale for that purpose, and such a sale is therefore absolutely void. *Tindall v. Peterson*, 71 Neb. 160; *Bizby v. Jewell*, 72 Neb. 755; *Hall v. Cooper*, *First Nat. Bank v. Pilger*, *Lyons v. Carr*, and *Brandon v. Jensen*, *supra*. It follows that the sale of the land in question by the administratrix was void.

By the terms of section 17 of the homestead act (laws 1879, p. 61) the land in question descended in fee, on the death of the intestate, to his children, subject to a life estate in his widow; and their right of action was not barred until the expiration of ten years from the attainment of their majority. So the decree of the trial court in favor of the defendants Henry L. Mason and Lester H. Mason, quieting their title to two-fifths of the land in question, was right and should be affirmed.

Finally, plaintiff insists that the judgment below should be reversed as to all of the defendants, except Nancy E. Mason, because section 17 of the homestead law is unconstitutional. His contentions are, in substance, first, that the provisions of that section relate to a subject wholly different from the one considered in the rest of the act, and are not clearly expressed in the title; second, that its provisions operate as an amendment to sections 30 and 67, ch. 23, Comp. St. 1905, and do not contain a repeal of the sections so amended; third, that the act is class legislation and is therefore unconstitutional.

The argument on the first proposition is that the first 16 sections of the homestead act relate to defining, transferring, selecting and preserving homesteads for heads of families, and defining who are such; that section 17 re-

lates exclusively to the descent of homesteads, and is in conflict with the provisions of section 30, ch. 23, Comp. St. 1905, in that it exempts them from liability for the debts of the decedent, while his other property is subject to their payment. These questions will be disposed of in the order above stated. The title to the act of February 26, 1879, commonly called the "homestead act," is as follows: "To provide for the selection and disposition of homesteads, and to exempt the same from judgment liens, and from attachment, levy, or sale, upon execution or other process." Laws 1879, p. 57. This in itself is a complete answer to the plaintiff's argument. It is the *disposition* of the homestead upon the death of the owner that the plaintiff complains of in this case, and it is apparent that the title to the act is broad enough to cover that subject.

Plaintiff's second contention on this point must also fail. The act in question is a special statute covering the whole subject of homestead, and is complete in itself. It takes that special subject out of the provisions of the general statute of descent without amending that statute, and according to our former decisions on this point is not unconstitutional.

Lastly, the act in question is not class legislation. It operates upon persons uniformly throughout the state, and therefore is not unconstitutional. The act exempts homesteads from forced sale to pay the debts of the head of the family, and is "a beneficent provision for the protection and maintenance of the wife and children against the neglect and improvidence of the father and husband." It is designed to protect citizens and their families from the miseries and dangers of destitution. It is an enlightened policy, looking to the general welfare, as well as to that of the individual citizen. It is a statutory right purely, created for the benefit of the debtor and his family. The levy and sale of a debtor's land and tenements have always been regulated by statute. At the common law the creditor had no right to sell the debtor's land. He could only sequester its rents and profits for the payment

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of his judgment. Hence, it is clearly within the power of the legislature to exempt a reasonable portion of the debtor's lands from levy and sale upon execution, attachment or other process, for the protection of his family; and such legislation does not conflict with our constitution. Indeed, such legislation has been upheld and commended by the courts of last resort in all of the states of the Union having constitutional provisions like our own. And so we are of opinion that the act in question as a whole is valid, and is a proper exercise of legislative power. Again, the homestead act has been in force in this state for nearly 30 years. All of its provisions have been frequently upheld by our courts, whose numerous decisions have become a rule of property, and we see no reason to depart from them at this time.

For the foregoing reasons, so much of the judgment of the trial court as granted any relief to the defendants, Ida E. Rowley, Henry L. Mason and Effie I. Harroun, is reversed. In all other things it is affirmed; and the case is remanded to the district court, with directions to enter a decree in accordance with this opinion.

JUDGMENT ACCORDINGLY.

The following opinion on motion for rehearing was filed March 19, 1908. *Rehearing denied:*

PER CURIAM.

In the opinion it is said: "While the court has jurisdiction of the subject matter, it has no jurisdiction over the homestead, and therefore it has no power to order its sale for that purpose, and such a sale is therefore absolutely void." The main point made in the argument on motion for rehearing is that "a judgment cannot be attacked collaterally where the court has jurisdiction of the parties and the subject matter." A number of authorities from this court are cited to sustain this proposition. The language of the opinion quoted is hardly correct. The court has jurisdiction of the subject of administrator's

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sales of real estate to pay debts; but, strictly speaking, it has no jurisdiction of the subject matter, that is, the matter or thing which it is desired to reach by legal proceedings, i. e., the homestead. The subject matter is defined by Black as "the thing in controversy." The language used in the opinion as to this point is not strictly accurate, but the reasons given for the conclusion seem to be satisfactory and the result is correct.

The motion for rehearing is therefore

OVERRULED.

NETTIE M. DIKE, APPELLANT, V. JOHN ANDREWS ET AL.,
APPELLEES.

FILED JANUARY 8, 1908. No. 15,022.

Interest on Judgment. Where judgment has been entered on a penal bond given to secure the payment of money in monthly instalments, a part of which were not due at the date of the entry of the judgment, interest should not be computed on the full amount of the judgment, but only on such instalments as are not paid at maturity, and then from the date of their maturity up to the time of their payment.

APPEAL from the district court for Saline county: LESLIE G. HURD, JUDGE. *Affirmed.*

W. G. Hastings, for appellant.

J. H. Grimm, contra.

DUFFIE, C.

December 15, 1900, defendants became sureties upon a bond given in a bastardy proceeding, the penalty of the bond being \$500. The order in the bastardy proceeding required the defendant in that case to pay the plaintiff thereon the sum of \$6 a month for a term of 12 years. Default was made in the payment of these monthly instalments, whereupon suit was brought upon the bond and

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judgment entered against the defendants herein for \$500, the full amount of the penalty. At different dates since the entry of said judgment defendants had made payments, amounting in the aggregate to \$521.10. In June, 1906, plaintiff obtained an order directed to the defendants to show cause why execution should not issue against them on this judgment. Defendants appeared, and insisted that the judgment had been fully paid, and that the order should be discharged. The court entered an order finding that the judgment had been paid in full, and dismissing the rule. Plaintiff has appealed.

It will be noticed that by the terms of the judgment in the bastardy proceeding the defendant in that case was required to pay the plaintiff \$6 a month for a term of 12 years. The bond upon which the defendants became sureties was executed for the purpose of securing such monthly payments. The question in issue between the parties is the interest which should be computed upon said judgment; the defendants insisting that interest should be computed upon such monthly instalments as they failed to pay at maturity, while plaintiff insists that interest should be computed upon the full amount of the judgment up to the date of the first payment made thereon, and upon the balance remaining due upon the judgment after each of the several partial payments which the record shows was made. If interest should be computed only on the monthly instalments after they fell due up to the time of their payment, defendants have paid the full amount due upon the judgment, and the order appealed from should be affirmed; but, if interest is to be computed upon the full amount of the judgment, giving the defendants credit for the partial payments made at the several dates of such payment, then there is a remainder of something more than \$80 still unpaid upon the judgment. The judgment entry in the suit upon the bond is in the following words: "On this 15th day of December, A. D. 1900, this being the 12th day of this term of court, this cause came on for hearing on plaintiff's motion for a judgment on the pleadings, and the same was argued and submitted

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to the court, and, the court being fully advised in the premises, the motion was sustained, and the court finds for the plaintiff for the penalty on the bond set forth in plaintiff's petition the sum of \$500; due on said penalty on November 24, 1900, the sum of \$132, for which execution is awarded. Defendant excepts to the finding of the court. It is therefore considered and adjudged by the court that the plaintiff have and recover of and from the defendants the penalty of the bond, being \$500, of which amount the sum of \$132 was due November 24, 1900, for which amount execution is awarded." No question is raised as to the form of the judgment entered, and the plaintiff does not contend that it could be collected otherwise than as the monthly instalments of \$6 matured.

The sole question then is: How should interest be computed on this judgment? Our statute provides that interest on all decrees and judgments for payment of money shall be from the date of rendition thereof at the rate of \$7 on each \$100 annually until the same shall be paid. Ann. St., sec. 6727. We think this statute has reference to judgments and decrees which may be immediately collected. The language is "interest on all decrees and judgments for the payment of money," indicating that the money is immediately due and collectible, and that its nonpayment by the defendant is a breach of duty on his part. The cases cited by plaintiff in support of his claim that interest should be computed upon the full face of the judgment do not, in our opinion, bear out his contention. *People v. Birdsall*, 20 Johns. (N. Y.) *297, is not in point. It appears from the facts stated by the reporter that judgment had first to be obtained against a sheriff for default in his office before suit could be maintained on his official bond and his sureties made liable. The reporter in that case refers to the statute in the following words: "By the *sixth* section of the act, it is declared that in case of any recovery by any party aggrieved against any sheriff for any default, etc., it shall be lawful for the judges of this court, upon motion in open court, to order the bond given

by the sheriff to be put in suit against him and his sureties; and, when judgment is obtained, the court shall, on motion in open court, direct so much to be levied thereon as shall be sufficient to pay to the party aggrieved his debt, etc. And that if, after judgment obtained upon such bond, any other party aggrieved, and who shall have recovered any debt or damages against such sheriff for any default, etc., shall apply to the court for relief, the court shall, upon motion in open court, direct such further sum to be levied on such judgment, etc., as shall be sufficient to pay the debt, etc., to such party aggrieved." One Jackson obtained leave to issue execution on a judgment theretofore obtained on the official bond of the sheriff at the suit of Meeker and King, and a motion to set aside this order was made on behalf of the sheriff's sureties upon two grounds: First, that no notice of the motion was served upon them; and, second, that the order for execution allowed the collection of interest on Jackson's judgment against the sheriff. The motion was sustained on the first ground, the court holding that the sureties were entitled to notice before the order was granted, but was overruled as to the second ground, the court holding that Jackson was entitled to interest on his judgment if the judgment was one that would carry interest. This is far from holding that the judgment on the official bond carried interest from its entry on such sums as were not then due, but which might be collected on it in the future. *Winslow v. Assignees of Ancrum*, 1 McCord Eq. (S. Car.) *100, also cited by the plaintiff as a case in point, does not uphold plaintiff's contention. The court, after stating that a judgment on a simple contract drew interest, added: "But the rule holds good also on judgments on penal bonds, if in fact the amount of the penalty be actually due and owing for principal and interest at the time of the judgment rendered." In other words, the holding was that, if there was due the plaintiff, when judgment on the penal bond was entered, the full amount of the penalty on the bond, interest could then be computed upon the

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judgment. The court presumed that the penalty in the bond for which judgment was given was not greater than the amount actually due the plaintiff and which the bond was given to secure, and interest on the judgment was allowed. The only case we have found where the question was discussed is *State v. Sarratt*, 14 Rich. (S. Car.) 29. The following is taken from the syllabus: "Under proceedings for bastardy commenced before the child has attained the age of 12 years, the father, upon conviction, may be required to enter into recognizance to pay \$25 a year, counting from the birth of the child, until its attainment of 12 years of age. The statute of limitations does not bar the prosecution, in cases of bastardy, for the annual penalties that had accrued before the proceedings were commenced. As interest is not chargeable upon the annual penalties, the jury, in allowing credit for advances made for the maintenance of the child, need not ascertain the time when the advances were made." It is true the opinion makes no reference to any statutory allowance of interest upon judgments or decrees of court, but the presumption must obtain that such a statute exists in every state where interest upon money due by contract is allowed.

After a somewhat extended search, we have been unable to find a case allowing interest on a judgment entered on a penal bond for such sums as the judgment may secure, but which are not immediately due and payable. Our examination has convinced us that interest on judgments of the character of the one in question should be computed only on such instalments as matured, from the date of their maturity until paid. This being the rule adopted by the district court, we recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CITY OF PLATTSMOUTH, APPELLANT, v. NEBRASKA TELEPHONE COMPANY, APPELLEE.

FILED JANUARY 9, 1908. No. 15,025.

1. **Cities: TELEPHONE FRANCHISE: USE OF STREETS.** A city ordinance extending to a telephone company the right to use the streets, alleys and public grounds of the city in the construction, operation and maintenance of its plant or system, and which does not, in any of its provisions, indicate an attempt to exclude other like corporations or companies from a like privilege, is not the grant of an exclusive right or privilege.
2. ———: ———: ———. The authorities of a city or incorporated town or village may grant to a telephone company the use of the streets, alleys and public grounds of the municipality for constructing and maintaining a telephone system therein, such use of the streets, alleys and public grounds being for a public purpose.
3. ———: ———: **ADDED BURDENS.** When an ordinance of a city has invited investments and expenditures, which are made in good faith and in reliance upon it, the city authorities, if the use be a public one, cannot arbitrarily impose by subsequent regulations, without necessity or the demands of public convenience, additional burdens upon the company which are clearly beyond the reasonable exercise of the police power.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

H. D. Travis, for appellant.

W. W. Morsman and *Matthew Gering*, *contra*.

DUFFIE, C.

The plaintiff brought this action in equity for a mandatory injunction, in which alternative relief is prayed. The material allegations of the petition are the following: (1) That the city of Plattsmouth has never granted defendant any lawful or sufficient franchise, nor any franchise to occupy the streets and alleys of the city; (2) that defendant has been occupying the streets and alleys of the city for more than 15 years without right or authority;

(3) that defendant has erected its poles and wires in Main street, along the south side, from First to Eighth streets, and has continued the same since the year 1888; that such poles and wires are dangerous to pedestrians and to property, are old and rotten, were used by the public as hitching posts for horses, and that thereby a nuisance was created; that the poles and wires interfere with the firemen in case of fire, and that the poles are unsightly; that in November, 1899, the city, by ordinance, required the defendant to place its wires underground in Main street, and that it failed and refused to comply with said ordinance; that in 1904 the city passed an ordinance requiring defendant to move its poles and wires from Main street to the alleys adjoining. The prayer is for an injunction against the use of the streets, alleys and public grounds of the city of Plattsmouth by the defendant, and that it be enjoined from operating its telephone system in the city; and, alternatively, if the court should find that the defendant had been granted a franchise for the use of the streets, that it then be required to remove its poles and wires from Main street between First and Eighth streets to the alleys north and south of Main street.

The answer admits that defendant has occupied the streets of the city and carried on its business therein, as alleged, for more than 15 years; that it has continuously maintained its poles and wires in and along the south side of Main street since the year 1888; that the city passed an ordinance in 1904, as alleged in the petition, requiring the defendant to remove its poles and wires to the alleys north and south of Main street, and which, defendant alleges, affirmatively repealed all prior conflicting ordinances. For a second defense it is alleged that defendant has maintained its poles and wires in Main street in the same place for more than 15 years with the knowledge and consent of the city; that in October, 1898, the city, by ordinance, granted defendant the right to occupy all the streets of the city without restriction, reserving to itself the free use of such poles for its own fire alarm wires;

that immediately after the passage of said ordinance defendant expended large sums of money in reconstructing its poles and wires in Main street; that its central office is in Main street and on the south side thereof; that Main street is 100 feet in width; that the sidewalks on each side are 20 feet wide; that defendant's poles are set at the curb line, 20 feet from the front walls of the buildings, and 160 feet apart; that there has never been on the south side of the street any building more than two stories high; that there never has been, and there is no prospect of, any congestion of the business in said street with which the poles of defendant will interfere in any degree whatever; that the alleys north and south of Main street are only 13 feet wide; that, if defendant's poles are set therein, they must be set $2\frac{1}{2}$ feet from the line to avoid projecting the cross-arms over private property; that the change will cost \$1,500, which is more than the net income from the defendant's system in said city in five years; that the ordinance passed in 1904 was not passed in the interests of the public and was an abuse of municipal power; that the ordinance is unreasonable, as the removal of defendant's poles and wires will serve no public interests, and its enforcement will impair the obligation of the contract between the city and the defendant.

On the trial the district court found generally for the defendant and dismissed the plaintiff's petition. The plaintiff has appealed.

The evidence shows that in each alley north and south of Main street there is a telephone line belonging to another company on one side of such alley and an electric light line belonging to the city on the other side. It is conceded that prior to October, 1898, defendant had no franchise granted by the city, the general statute relating to cities and villages of the class to which Plattsmouth belonged being deemed sufficient; but on that date the city passed an ordinance granting certain rights and privileges to the Nebraska Telephone Company, its successors and assigns, and regulating the erection of poles and wires and pro-

tecting the same. The ordinance, No. 91, so far as material to an examination of the questions involved, is as follows: "Section 1. That the Nebraska Telephone Company, its successors and assigns, be and are hereby granted right of way for the erection and maintenance of poles and wires and all appurtenances thereto for the purpose of transacting a general telephone and telegraph business through, upon and over the streets, alleys, and public grounds of the city of Plattsmouth, Nebraska; provided, that said company shall at all times when requested by the proper authorities permit their poles and fixtures to be used for the purpose of placing and maintaining thereon, free of charge, any wires which may be necessary for the use of the police or fire departments of the city of Plattsmouth, Nebraska; and further provided, that such poles and wires shall be erected so as not to interfere with ordinary traffic through such streets and alleys, and under the supervision of the committee on streets, alleys and bridges." Section 2 provides for stringing the wires 20 feet above the ground, and for the temporary removal of the poles and wires in case they obstructed any vehicle or structure being moved along or across any street or alley. Section 3 fixes the maximum rate allowed to be charged by the company, and section 4 makes it an offense to injure any poles, wires or instruments of the company. Soon after having completed the rebuilding of its system, the city passed another ordinance, of date November 27, 1899, declaring it unlawful to erect or maintain poles and overhead wires in Main street, and requiring all such wires to be placed in underground conduits; and on June 27, 1904, the city passed an ordinance requiring all poles and overhead wires to be removed from Main street between First and Eighth streets to the alleys adjacent thereto, said removal to take place by January 1, 1905, and repealing all ordinances in conflict therewith.

The defendant asserts that, having accepted the provisions of ordinance No. 91 and having expended large sums of money in reconstructing its lines in the city of

Plattsmouth under the permission granted by that ordinance, it has acquired a right in the streets of the city which cannot be taken away, except upon some ground of public necessity or convenience; while, on the other hand, the city asserts that the ordinance is void. The argument upon which it attempts to maintain the invalidity of the statute is as follows: Section 15, art. III of our constitution, prohibits the legislature from passing local or special laws granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever; and it is said that the legislature cannot delegate to a municipality a power which it cannot itself exercise. It is claimed that the ordinance in question is an attempt to grant to the defendant a special privilege or franchise, and that this is beyond the power of the municipal authorities. If we should concede (which we do not) that a general law, granting to cities and towns the powers which are usually found in their charters, did not confer upon such municipalities the power to pass and enforce special ordinances suited to their local conditions, still the ordinance in question is not subject to the criticism made upon it. A special privilege in constitutional law is a right, power, franchise, immunity or privilege granted to, or vested in, a person or class of persons to the exclusion of others and in derogation of common right. *Guthrie Daily Leader v. Cameron*, 3 Okla. 677, 41 Pac. 635. In *City of Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. 577, it was held that the act of congress of March 2, 1867, providing that the legislative assemblies of the several territories shall not grant any special privileges, refers to the granting of monopolies such as ferries, trade-marks, or the exclusive right to manufacture certain articles or to carry on a certain business in a particular locality, to the exclusion of others, and does not include the granting of a public charter to a municipal corporation. Ordinance No. 91 does not attempt to confer upon the defendant any exclusive right or franchise, and leaves it open for the city, at any time, to extend to other companies or corpora-

tions the same privileges awarded to the defendant. The contention, therefore, that ordinance No. 91 is void and confers no right upon the defendant cannot be sustained.

Subdivision XII, sec. 69 of plaintiff's charter (Comp. St. 1905, ch. 14, art. I) is in the following words: "To make all such ordinances, by-laws, rules, regulations, resolutions, not inconsistent with the laws of the state as may be expedient, in addition to the special powers in this chapter granted, maintaining the peace, good government, and welfare of the corporation, and its trade, commerce, and manufactories." Subdivision 24 of said section authorizes the city authorities to regulate the streets, "lamp-posts, awning posts, and all other structures projecting upon or over and adjoining, and all other excavations through and under the sidewalks in the said city or village." Subdivision 28 empowers the city or village "to open, create, widen, or extend any street, avenue, alley, or lane, or annul, vacate, or discontinue the same whenever deemed expedient for the public good." The use of the telegraph and telephone is so far a public convenience and necessity that in some states property may be condemned therefor under the power of eminent domain. *State v. American & European News Co.*, 43 N. J. Law, 381; *Pierce v. Drew*, 136 Mass. 75; *Pensacola T. Co. v. Western Union T. Co.*, 96 U. S. 1. It is therefore evident that the use of streets for telephone or telegraph purposes is a use for public purposes against which no objection can be made. As said in *Hobbs v. Long Distance T. & T. Co.*, 147 Ala. 393, 7 L. R. A. (n. s.) 87: "Since the days of the Cæsars, public highways have received the careful attention of all governments, not only for the purpose of providing ways by which armies could be moved and the people travel, but for the purpose of opening up avenues of communication by which reports could be speedily brought to the capital, and the interchange of commerce promoted. The laws of congress have provided for post roads, etc., before the telephone was known, provided for the same privileges for telegraph com-

panies, as were given to railways in using the public lands, and, in later days, it has developed the exceedingly valuable system of 'post routes' and free mail delivery along the public roads of the country, so that not the least important function of the public roads of the country is the transmission of messages from place to place." The people of the city of Plattsmouth are not alone interested in the telephone system of that city, but every other community in the state with which communication is made is equally interested, and the state itself has recognized the utility and necessity of this method of communicating news by granting a right of way for the building of such lines over the public highways of the state. Comp. St. 1905, ch. 89a, sec. 14. Under the general power given to the plaintiff by its charter and the general control which it exercises over the streets and public grounds of the city, its right to extend to the defendant the privilege of occupying its streets and public grounds cannot be questioned. *Nebraska T. Co. v. City of Fremont*, 72 Neb. 25.

The only question remaining is whether the public necessity or convenience requires that its wires in Main street should be placed in underground conduits or removed to the alleys north and south of said street between First and Eighth streets. That the rights of the defendant in the streets of the city must yield to public necessity or convenience is beyond question or dispute; but, having acquired a right in the streets, and having made expenditures on the strength of the grant extended by the city, the authorities are quite uniform that this right cannot be taken away in an arbitrary manner and without reasonable cause. In *Northwestern T. E. Co. v. City of Minneapolis*, 81 Minn. 140, it is said: "When such an ordinance has invited investments and expenditures made in good faith and in reliance upon it, the city authorities cannot arbitrarily impose by subsequent regulations, without necessity, or the demands of public convenience, additional burdens upon the company which are clearly beyond the reasonable exercise of the police power." In the body of

the opinion it is said: "An ordinance of a municipality, surrendering a part of its powers to a corporation to secure and encourage works of improvement, which requires the outlay of money and labor, to subserve the public interests of its citizens, when accepted and acted upon, becomes a contract between the city and the corporation which relied upon it, and the grantee cannot be arbitrarily deprived of the rights thus secured." In support of this principle authorities from the states of Ohio, Louisiana, Iowa, Massachusetts, Wisconsin, and numerous federal decisions are cited. That the city council may make reasonable regulations relating to the maintenance and repair of defendant's plant is not open to argument; but such regulation is not to be exercised at mere whim and caprice. It must be proportionate to, and commensurate with, the public necessity for the protection and promotion of the public health, safety, necessity or convenience. *City of Burlington v. Burlington Street R. Co.*, 49 Ia. 144. The application of the police power cannot be extended by the authority which is entrusted with such application to an arbitrary misuse of private rights. That the city may order the removal of poles which endanger the citizens because of a rotten condition, and protect its inhabitants against any conduct of the business which endangers the public health or safety, is not a question open to dispute; but nothing of the kind appears in the record before us. As before stated, Main street is 100 feet in width. There is no evidence of a congested condition of the street or of any necessity from other causes for removing the defendant's poles.

So far as the record discloses, the action of the city council is arbitrary in its nature and wholly unsupported by any reasonable cause. Such being the case, we think the district court was right in refusing the injunction, and we recommend an affirmance of its judgment.

EPPELSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOHN W. WHIFFIN, APPELLEE, v. CHARLES E. HIGGIN-
BOTHAM ET AL., APPELLANTS.

FILED JANUARY 8, 1908. No. 15,034.

Tax Sales: RIGHTS OF PURCHASERS. Section 242 of the revenue act of 1903 (Comp. St., ch. 77, art. I) saves to the parties purchasing land at tax sales held prior to the passage of that act all rights, vested or otherwise, extended to them by the statute in force when the purchase was made.

APPEAL from the district court for Adams county: ED
L. ADAMS, JUDGE. *Affirmed.*

J. W. James, for appellants.

Tibbets, Morey & Fuller, contra.

DUFFIE, C.

November 7, 1900, John W. Whiffin, the plaintiff and appellee, purchased at public tax sale lots 16 and 17. in block 16, in the city of Hastings, Nebraska, for delinquent taxes then due, amounting to \$191.15. He has paid subsequent taxes as they accrued from year to year, including the taxes for 1905, and on April, 1906, he commenced this action to foreclose said tax sale certificate. Objection, both by demurrer and answer, raised his right to foreclose; the defendant Farrell insisting that the action was barred by statute. Judgment went in favor of the plaintiff, and defendant Farrell has brought the case to this court on appeal.

Under the law in force in 1900, when the property was bid in at tax sale, the purchaser had five years from the date on which the action accrued—that is, from the date of the expiration of time of redemption by the owner—to commence his action to enforce his lien against the land for the purchase price of his certificates, and for subsequent taxes paid by him, thus giving him seven years from the date of sale to commence such action. *Stevens*

v. Paulsen, 64 Neb. 488. April 4, 1903, what is known as our new revenue law was passed and approved. Sections 232 and 233 of that act (Comp. St., ch. 77, art. I) limit the time within which an action to foreclose a tax lien may be commenced to three years from the expiration of the right of redemption, or five years from the date of the sale. The limitation provided by the legislature for commencing an action relates to the remedy, and the authorities are uniform that the legislature may, by amendment, shorten the time previously given for commencing an action, if the new statute provides a reasonable time to institute actions which have accrued before the amended law goes into effect. As a general rule, parties who have entered into a contract, taken part in any transaction, or acquired any right of property, have no vested rights in the existing statute of limitations. *Pearsall v. Kenan*, 79 N. Car. 472. Such statutes have been uniformly construed as affecting merely the remedy, and may operate retroactively. *Watts v. Everett*, 47 Ia. 269. In *Terry v. Anderson*, 95 U. S. 628, Chief Justice Waite said: "It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for a commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain." This rule has been recognized and enforced by this court in *Horbach v. Miller*, 4 Neb. 31, and *O'Brien v. Gaslin*, 20 Neb. 347.

Defendant Farrell insists that this rule should be applied in this case; while plaintiff relies upon section 242 of the new revenue act (Comp. St., ch. 77, art. I) to take the case out of this general rule. That section is in the

following language: "Nothing in this act shall be construed to release, discharge, or in any way affect the validity or the collection of any tax heretofore assessed and levied under the revenue laws in force prior to the taking effect of this act, nor shall the same affect pending actions founded thereon or causes of action which may have accrued; but all rights in relation to such taxes and the collection thereof and all rights that may have accrued to persons under the revenue laws of this state are hereby saved and reserved." Defendant argues that this section saves to the defendant nothing but vested rights, and that it does not cover or include the remedy for enforcing such rights or the time within which an action to enforce his remedy should be brought. The law has been well settled that the legislature cannot take away or affect vested rights, and this has been so long and well established that we cannot presume the legislature attempted by this section to reserve to a tax sale purchaser a right of which it had no power to deprive him. If the section is construed to mean that it saves to the plaintiff or others having like claims only such rights as have become vested in consequence of his purchase, then the section would be meaningless and could have no effect whatever. We cannot presume that the legislature passed a meaningless statute, and the only force which this section can have is to save to the plaintiff and others in his position every right given him by the old revenue law, whether it related to his cause of action, or to the means of enforcing it and the time within which he should apply to the courts for his remedy. It may be questioned, also, whether the seven years given him by the old act was not a vested right. Under it his lien against the land purchased existed for seven years from the date of the sale. The new act preserves the lien of a tax sale purchaser for five years only. In *Alexander v. Shaffer*, 38 Neb. 812, it was held: "When land has been sold for taxes and a suit to foreclose the lien therefor is not instituted within five years from the expiration of the time to redeem, the lien is extinguished and ceases to be

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a charge upon the land. The statute in that respect does not merely operate to defeat the remedy, but limits the duration of the lien itself." This case was followed in *Osgood v. Westover*, 2 Neb. (Unof.) 668. It will be seen, therefore, that our new revenue act not only shortens the time within which an action to enforce a lien may be commenced, but it also shortens the life of the lien itself. We are quite clear that the plaintiff's rights are to be measured by the provisions of the old revenue law under which his purchase was made, and not by the act of 1903.

We recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ANNIE MANNING, APPELLANT, v. CHARLES W. OAKES ET AL.,
APPELLEES.

FILED JANUARY 9, 1908. No. 15,042.

Tax Deed: VALIDITY. A tax deed issued to a former tenant of the premises cannot be avoided or set aside on the ground that such former tenant was indebted to the fee owner for rent which accrued during the tenancy.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Affirmed.*

J. C. McNerney, for appellant.

Shepherd & Ripley and *I. H. Hatfield*, contra.

DUFFIE, C.

This suit brings in question the title to a part of lot 6, in block 5, Avondale addition to the city of Lincoln. The plaintiff, Mrs. Manning, holds a deed from the prior

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owner of the fee. The defendant, Lydia L. Newcomb, claims under a judicial sale for taxes. Some time in 1900 Mrs. Newcomb rented the premises of one Edward Hughes, acting as agent for Mrs. Manning, the fee owner. The lot had previously been sold for taxes to one Oakes, who had commenced an action to foreclose his tax lien and had taken a decree in May, 1899. Some negotiations were had, pending the foreclosure proceedings, between Oakes' attorney and Mr. Hughes relating to a redemption from the tax sale, and Hughes had, from time to time, paid small amounts, and even after the entry of decree had made one or two small payments, but no valid agreement not to sell under the decree has been shown. In the meantime Mrs. Newcomb and her husband were in possession of the lot as tenants of Mrs. Manning, and in 1903 she purchased the premises at tax sale, and is still the owner of the tax sale certificate. Some time in 1904, after the death of her husband, she vacated the premises, and in 1905 took an assignment of the decree in favor of Oakes, had an order of sale issued, the lot sold, and a deed issued under which she now claims title. The tax sale certificate issued to her in 1903 has never been foreclosed, and her title rests upon the sale made under the foreclosure in the Oakes case.

Mrs. Manning brought this action to redeem from the sale for taxes, and she insists that the Oakes judgment was paid in full prior to the assignment to Mrs. Newcomb, and that the deed ought to be held void for that reason. She further invokes the well-known rule that a tenant, while in possession, cannot acquire title adverse to the landlord, and that a purchase by the tenant under a judicial or tax sale is presumed to be for the protection of the tenant's possession, and not with the purpose of asserting a title adverse to the landlord. In this case Mrs. Newcomb is not asserting any title under the tax sale certificate acquired in 1903 while she was in possession as tenant of Mrs. Manning, and her right under such certificate need not be considered. When she took an assignment of the Oakes foreclosure decree, she had surrendered possession of the

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premises, and was living in the state of Kansas. She had ceased to be a tenant of Mrs. Manning, and had the same right to purchase the Oakes decree as had any other party. The fact that she may have been indebted for rent, which accrued during her possession of the premises as tenant of Mrs. Manning, could not affect her right to purchase this decree. If that decree had not been paid in full, a sale thereunder conveys good title. A careful reading of the bill of exceptions convinces us that the trial court was right in holding that the Oakes decree had not been fully paid and satisfied. Plaintiff had every opportunity to redeem from that foreclosure. It stood from 1899 until 1905, when assigned to Mrs. Newcomb. We can discover no fraud on Mrs. Newcomb's part in taking an assignment of that decree, or insisting that her title acquired from a sale made thereunder is valid.

We think the decree appealed from was the only one which the evidence warrants, and recommend its affirmation.

EPPELSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree appealed from is

AFFIRMED.

AUGUST WAGNER, APPELLANT, v. LINCOLN COUNTY ET AL.,
APPELLEES.

FILED JANUARY 8, 1908. No. 15,053.

1. **Judgment: VALIDITY: CONSTRUCTIVE SERVICE.** A judgment rendered on service by publication against a resident of this state, on whom personal service might have been had, is absolutely void.
2. **Tax Foreclosure: SALE: REDEMPTION.** A decree foreclosing a tax lien on real property was entered against the owner, a resident of the state, on service by publication. In an action to redeem from a sale made under said decree, the plaintiff was required to pay the costs of the foreclosure suit and of the sale made thereunder. *Held, Error.*

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Decree modified.*

August Wagner, A. Muldoon and I. L. Albert, for appellant.

L. E. Roach and Wilcox & Halligan, contra.

DUFFIE, C.

In November, 1901, the county of Lincoln commenced an action to foreclose its lien for taxes which were then delinquent and unpaid on the land in controversy herein. A decree in favor of the plaintiff was entered, and the land was sold under said decree to the defendant William Horner, to whom the deed was made. At the time of commencing said action, and when the decree was entered, one Johanna Dineen was the owner of the fee title and a *bona fide* resident of the state. Service was had by publication only, and the fee owner had no notice or knowledge of the pendency of the action. By several mesne conveyances the fee title became vested in the plaintiff prior to the commencement of this action, and he seeks to have his title quieted as against the tax lien foreclosure, offering in his petition to pay all taxes due on the land with interest. The court entered a decree quieting plaintiff's title, but requiring him to pay, in addition to the taxes and interest, the cost of the foreclosure proceeding and the sale had thereunder, amounting to about \$60. Plaintiff has appealed from so much of the decree as requires him to pay these costs.

A decree against a *bona fide* resident of the state based upon service by publication is absolutely void. *Eays v. Nason*, 54 Neb. 143; *German Nat. Bank v. Kautter*, 55 Neb. 103; *Payne v. Anderson*, ante, p. 216. The tax foreclosure and the sale thereunder being void, we can discover no reason for requiring the plaintiff to pay the cost of such void proceedings. We therefore recommend that the decree be modified, and that plaintiff's title be quieted upon

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his paying to the defendant Horner the amount required to redeem from the tax sale, and that the cause be remanded to the district court, with directions to enter such a decree.

EPPELSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree is modified, and the plaintiff's title quieted upon his paying to the defendant Horner the amount of the foreclosure decree, with interest on the same at 7 per cent. per annum from the date thereof, and all subsequent taxes paid by the defendant Horner, with interest at 10 per cent. per annum, and the cause is remanded to the district court, with directions to enter such a decree.

JUDGMENT ACCORDINGLY.

JAMES N. BROWN ET AL., APPELLANTS, V. CARY B. JAMES
ET AL., APPELLEES.

FILED JANUARY 8, 1908. No. 14,952.

1. **Note: PLEDGEE: EQUITIES.** A note pledged before maturity as security for a loan made to the payee or owner is good in the hands of the transferee, who had no notice of equities between the original parties.
2. **Pledge of Notes: DEBTS SECURED.** Negotiable instruments may be pledged to secure liabilities arising in the future; but to ascertain what debts are secured resort must be had to the contract of the parties.
3. ———: ———. A contract of pledge, which provided that certain notes were to be held as security for a certain debt, and "any other liability or liabilities due or to become due or which may hereafter be contracted," *held*, under the circumstances of this case, not to secure the payment of moneys afterwards collected for the pledgee by the pledgor as agent and unlawfully converted by the latter.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed as modified.*

Samuel Rinaker, Robert S. Bibb and Horace Comfort, for appellants.

A. D. McCandless and W. S. Glass, contra.

EPPELSON, C.

James N. Brown and Frank L. Brown, partners doing business as James N. Brown & Co., appeal from a decree of the district court for Gage county awarding them foreclosure of a mortgage in the sum of \$2,174.93; the sole complaint here being that the decree is inadequate in amount to adjust the equities of the parties and should have been for a much larger sum, to wit, \$12,046.93.

It appears that on May 1, 1895, defendant James and wife executed and delivered to defendant J. C. Burch a mortgage upon the land in controversy to secure the payment of \$7,000, evidenced by two promissory notes, due May 1, 1896. About the 1st of September, 1895, the notes were sent by the bank of Wymore to the plaintiffs herein. Just what the purpose was is not made clear by the evidence, nor do we consider it important. They were either delivered to the plaintiffs for the purpose of sale, or as a pledge to secure a loan which the defendant, the bank of Wymore, contemplated securing from the plaintiffs later on. At that time the bank was not indebted to plaintiffs, Brown & Co., but the latter retained possession of the notes and mortgage. Afterwards, in pursuance of an understanding between plaintiffs and the bank, the notes and mortgage were held as collateral security from and subsequent to December 31, 1895, for an indebtedness of \$5,000 (evidenced by a promissory note) contracted on that date. In addition to the \$5,000 indebtedness, plaintiffs contend that they are entitled to hold the security for other indebtedness due from the bank. The \$5,000 note of December 31, 1895, is a stock collateral note containing provisions

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whereby the bank pledged to plaintiffs certain notes to secure the said indebtedness and any other liability or liabilities of the bank to the plaintiffs, which provisions will hereinafter be specifically referred to. On September 25, 1895, the mortgagor James and wife conveyed the land in controversy by warranty deed to Benjamin Burch in consideration of the payment of the mortgage indebtedness and certain other obligations due from James to the bank of Wymore. Burch immediately conveyed the land to the bank, which held title until several years later, when the bank conveyed it to the defendants Taylor and Pisar. The deeds, however, from James to Burch and from Burch to the bank were not recorded until August 26, 1896, on which date the bank failed. Benjamin Burch and J. C. Burch were president and cashier, respectively of the defendant, the bank of Wymore, and it appears that in taking the mortgage and deed from James they were acting as the agents or trustees of the bank.

Some controversy exists as to when plaintiffs learned that the bank had procured title to the James land. We are convinced that they learned of this fact when the bank failed, and not before, and that the officers of the bank purposely withheld knowledge of such fact from the plaintiffs until that time. Soon after the failure of the bank J. C. Burch was appointed receiver and as such remained in possession of the bank's affairs for several months, during which time he issued to plaintiffs herein receiver's certificates Nos. 1 and 2, representing indebtedness due from the bank to plaintiffs aggregating \$3,770.11. Of this amount, \$2,425.46 was money collected by the bank for plaintiffs upon mortgages belonging to the plaintiffs. \$1,354.65 was owing to depositors at the time of the bank's failure and subsequently purchased by plaintiffs herein. Later, under the provisions of the banking law, the receiver was discharged and the bank took control of its own affairs and resumed banking business. Some time prior to July 12, 1901, the bank collected for plaintiffs the sum of \$636 on what is known as the Baulman mort-

gage. We are left entirely in the dark as to the time when this collection was made. In July, 1901, J. C. Burch, cashier of the bank, went to New York city for the purpose of negotiating a settlement with plaintiffs, who were then threatening to institute actions to foreclose the mortgages which the bank had collected and failed to account for. While there he executed a contract in the name of the bank purporting to convey to plaintiffs the James notes and mortgage and certain land, and to give authority to plaintiffs to sell the same, and pledged the proceeds thereof to the payment of the receiver's certificates and the Bauhman collection above described. Other items of indebtedness also were included in this contract, but plaintiffs no longer contend that they should be included in their decree of foreclosure.

Plaintiffs now ask to foreclose the James mortgage for the purpose of satisfying the items of indebtedness above described, together with a remainder due upon the \$5,000 note given by the bank on December 31, 1895. The district court found that there was due upon the \$5,000 note the sum of \$2,015.38, with interest at 5 per cent. per annum from the institution of the suit, together with the sum of \$159.10 for taxes paid by plaintiffs upon the mortgaged property, and found against plaintiffs as to the other items of indebtedness relied upon. The stock collateral note is in part as follows: "\$5,000. New York, December 31, 1895. On demand, without grace, for value received, we promise to pay to James N. Brown & Co. or order, five thousand dollars, at their office in New York city, in United States gold coin or its equivalent, with interest at the rate of — per cent. per annum from date hereof, having with said bank as collateral security for payment of this or any other liability or liabilities of ours to said firm due or to become due, or which may be hereafter contracted, the following property, viz., collateral to the amount of \$13,913.86, as listed upon attached memorandum, marked J. C. B., Cashier." The James \$7,000 notes were included in the memorandum referred to in the

above stock collateral note. By reason of the provision pledging the security "for payment * * * of any other liability or liabilities of ours to said firm due or to become due, or which may be hereafter contracted," plaintiffs contend that the James notes are chargeable as security for the several items represented in the receiver's certificates and the Bauhman collection.

It is argued that the sums subsequently converted by the bank to its own use constituted indebtedness arising by virtue of an implied contract which the law imposes in such cases upon the tort-feasor to repay to the owner the value of the property converted. There can be no doubt that such liability exists, and that the law implies a contract in such cases, but it cannot be said that at the time of the making of the contract in the stock collateral note the parties contemplated the illegal converting of the money and funds due plaintiffs, nor that they intended that the security pledged should be used for such purposes. The agreement of the parties must determine what debt or debts are secured, and such agreement must be ascertained from the writing by which the securities were pledged. A fair interpretation of the agreement made in this case demands that it be construed to secure such indebtedness only as might be contracted by the parties in the legitimate transaction of business. If the contract, standing alone, was not susceptible of such construction, we think it is rendered so when read in connection with an instrument executed by the bank July 14, 1896, and accepted by the plaintiffs. This is an additional or substituted pledge of several notes, including the James notes, and provides: "The following is a list of collateral notes held by James N. Brown & Co. for note dated Dec. 31, 1895, originally made for \$5,000, and of which there is now due \$3,440, and one demand note for \$3,000, dated July 14, 1896. It is expressly understood and agreed that any part or all these collateral notes shall be applicable as security in the discretion of James N. Brown & Co. on either or both notes." These agreements should be con-

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sidered together in determining what indebtedness the collateral notes secured. And it is apparent that after July 14, 1896, the collateral described in the instrument of that date was not intended by the agreement of the parties as security for any indebtedness other than the two notes described. The \$3,000 note therein mentioned was subsequently paid and has nothing to do with the present controversy.

For the same reasons plaintiffs cannot in this action enforce collection of receiver's certificates Nos. 3 and 199, which represent the debts plaintiffs bought of the bank's depositors. Intimate business relations had existed between plaintiffs and the bank since 1890. James N. Brown at one time purchased one-half the capital stock of the bank for himself and friends, which, however, was disposed of before the bank's failure. Frank L. Brown owned 20 shares of the capital stock of the bank when it failed. Each of the plaintiffs, at different times, held positions—director and vice-president—in the bank of Wymore. We are convinced that plaintiffs, or one of them at least, purchased the depositors' claims against the bank as a speculation, probably believing at the time that the bank would pay out in full; and, having bought these claims, they cannot expand their previous contract for collateral so as to cover such indebtedness. Neither is the Bauhman collection secured by the pledge. The evidence does not disclose when this liability was incurred, but the reasons above given for rejecting the other obligations apply to this. The contract of July 12, 1901, gave no rights to plaintiffs as against the equities of Taylor and Pisar, who had previously paid full value for the land, for the reason that it was executed after the vesting of their interests, and the plaintiffs do not now rely upon this subsequent contract as against Taylor and Pisar.

Computing the amount of recovery upon the \$5,000 note, the court found that there was due thereon September 22, 1896, \$3,568.37, upon which \$1,900.49 had been paid, leaving a remainder of \$1,667.88 due January 1, 1900. The

evidence does not show the accuracy of the court's computation. Instead, we find that there was due, August 26, 1896, \$3,644.37, which had, on January 1, 1900, been reduced to \$1,743.88. The trial court allowed interest at 5 per cent. upon the amount it found due, and then only from the commencement of this action. Evidently the court considered the rate of interest allowed by the laws of New York in such cases to be 5 per cent. We find no evidence to support this conclusion. Instead, the evidence is that the debt drew interest at 6 per cent. (the legal rate in New York according to the testimony of one of the plaintiffs), which we think should be considered as the contract rate. Plaintiffs are also entitled to interest from January 1, 1900. It follows that the amount due on the date of the decree was \$2,576.22 instead of \$2,174.93.

Plaintiffs argue that defendant's evidence as to the payment of the \$1,900.49 was incompetent, because the witness J. C. Burch, who was the only witness called by defendants to prove this fact, testified from a memorandum which was copied from the bank's books. This testimony was given by deposition, and we are unable to find where the objection made to this evidence was ruled on by the trial court, or an exception entered to its admission. Correspondence between the bank's officers and plaintiffs shows that funds were available for the bank's creditors, and, further, that some of the bank's books were lost. In view of these facts, we give weight to the evidence of payments, rather than the testimony of one of plaintiffs' witnesses, who stated that nothing had been paid on this note. The James notes were specifically pledged for the security of this debt. There was no intention of merger when the bank acquired fee title from James. When the defendants Taylor and Pisar purchased the land, the public records disclosed the existence of the James mortgage, and an assignment thereof to the plaintiffs, who had possession of the notes. Defendant Taylor, at least, had actual knowledge that the mortgage was not

fully paid. Plaintiffs are *bona fide* holders of the James notes to the extent of their interest herein determined.

Defendants contend that the evidence does not justify a recovery by plaintiffs in any amount, and in their brief ask the court to dismiss the plaintiff's action. The record shows that the defendants did not appeal, and, moreover, paid the amount found against them to the clerk of the district court, and for this reason are in no position to now question the judgment of the trial court.

The evidence clearly indicates that plaintiffs are entitled to recover the amount due on the \$5,000 note, and we recommend that the decree be modified so as to fix the amount of recovery at \$2,576.22, and that the decree, as modified, be affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is modified so that plaintiffs shall recover \$2,576.22, and, as so modified, is affirmed.

JUDGMENT ACCORDINGLY.

114-633

DORA BECK, APPELLEE, v. GEORGE F. STAATS, APPELLANT.

FILED JANUARY 8, 1908. No. 14,972.

1. **Vendor and Purchaser: EXECUTORY CONTRACT: BREACH: DAMAGES.**
The measure of damages for the breach by the vendor of an executory contract for the conveyance of real estate, where the breach is caused either from the refusal or the inability of the vendor acting in good faith, is the difference between the value of the land at the time of the breach and the price he contracted to receive, and in addition thereto the vendee may recover the amount advanced upon the purchase price.
2. **Case Overruled.** The third paragraph of the syllabus to *Reed v. Beardsley*, 6 Neb. 493, overruled.
3. **Vendor and Purchaser: IMPROVEMENTS BY TENANT: REMOVAL.** Upon an issue between the vendor and vendee of real estate, whose

contract fails to specify improvements made by a tenant in possession, but recognizes the existence of such and the right of the tenant to remove the same, the presumption is that such improvements were removed at the expiration of the lease.

4. **TRIAL: VIEW OF PROPERTY BY JURY.** Under section 284 of the code, providing for a view by the jury of property which is the subject of litigation, or the place where any material fact occurred, whenever in the opinion of the court it is proper, the court may in his discretion require the jury to view any such property within this state.
5. **APPEAL: DISCRETION OF COURT.** Unless an abuse of discretion is shown, this court will not reverse a judgment of the district court, because of the refusal of the court to permit the jury to view the premises.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

F. Dolezal, for appellant.

Grant G. Martin, contra.

EPPELSON, C.

In July, 1905, the parties hereto entered into a written contract wherein the defendant agreed to convey to plaintiff 80 acres of land in Saunders county on the 1st day of March, 1906. Plaintiff paid \$100 in cash and agreed to assume \$2,000 of an incumbrance and to pay a remainder of \$2,460 upon maturity of the contract. When the contract was made, defendant owned but an undivided one-half interest in the land in controversy. He and one Harmon owned in equal shares this land and 80 acres adjoining it. In February, 1906, defendant sold and conveyed all of his interest in the land to Harmon. This action was brought to recover damages for the loss of plaintiff's bargain. She obtained judgment in the court below for \$1,105.90, and defendant appeals.

Defendant contends that before the contract was executed he had his co-owner's verbal promise to convey his interest to defendant; that the contract was made upon the condition that Harmon would convey, but thereafter he re-

fused, though defendant in good faith importuned him so to do. Evidence was introduced in support of this contention. In conflict therewith, plaintiff's evidence is to the effect that defendant represented to her that he had procured Harmon's interest in the land. It is the defendant's theory that the rule for the recovery of damages against a vendor acting in good faith is that nominal damages only may be recovered, together with the amount deposited, with interest. He asked for and was refused an instruction submitting this theory to the jury. We are met at the threshold of this investigation with a conflict in the decisions of this court. In *Reed v. Beardsley*, 6 Neb. 493, it was held: "On an agreement to exchange lands, if one of the parties performs the contract on his part by conveying, and the other neglects to do so, and finally puts it out of his power to perform, the true measure of damages is the value of the property conveyed." The measure of damages there was the value of the consideration given by the vendee, and not the value of the property he contracted to purchase. To the same effect is *McPherson v. Wiswell*, 19 Neb. 117. And in *Eaton v. Redick*, 1 Neb. 305, the vendee, upon rescission by his vendor, was permitted to recover the amount advanced by him upon the purchase price, although himself in default. These cases have never been expressly overruled; but, in view of the decisions following the contrary rule, they cannot be said to establish the law in this jurisdiction. In *Wasson v. Palmer*, 13 Neb. 376, it was said: "The proper measure of damages was the difference between the contract price and the actual value of the property at the time the contract was broken." There the question of good faith on the part of the grantor was no part of the case and was not considered by the court. The same rule prevailed in *Carver v. Taylor*, 35 Neb. 429; *Seaver v. Hall*, 50 Neb. 878; *Nolde v. Gray*, 73 Neb. 373. In *Seaver v. Hall*, *supra*, after reviewing the former decisions of this court, it is said by Mr. Commissioner IRVINE: "It would appear that this court has thereby placed itself on both sides of the much

disputed question as to whether, when the vendor cannot make title, only nominal damages can be recovered, or whether the vendee is entitled to the benefit of his bargain. Some cases hold that the former rule applies where the vendor acted in good faith (*Conger v. Weaver*, 20 N. Y. 140), and that the latter applies when the vendor was guilty of fraud (*Pumpelly v. Phelps*, 40 N. Y. 59). * * * It may well be doubted, however, whether, in a state where exemplary damages are not permitted, the measure of recovery should depend on the good faith of the vendor. The object of the law is to afford compensation, and not to punish, in civil cases, and the actual damage is the same regardless of the motive of the vendor." In *Violet v. Rose*, 39 Neb. 661, it was held that a vendee was entitled to recover damages caused by delay of his vendor in making the conveyance, and the measure of damages was the difference between the value of the property when it should have been conveyed and its value at the time of the delayed conveyance. For a wilful refusal to convey, a vendor, in *McMurtry v. Blake*, 45 Neb. 213, was held liable to the full extent of his vendee's lost opportunity to sell to advantage.

Defendant relies upon *Flurcau v. Thornhill*, 2 Wm. Bl. (Eng.) *1078, and the decisions of the American courts in accord therewith. It was there held that, on a contract for the purchase of real estate, if the title proves bad, and the vendor is without fraud unable to make a good one, the purchaser is not entitled to damages for the loss of his bargain. Relative to the contract, Blackstone, J., said: "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title." In *Hopkins v. Grazebrook*, 6 B. & C. (Eng.) *31, the vendor, at the time he contracted to sell, had substantially no estate, and the conditions of sale provided for a good title. It was held that the vendee could recover for the loss of his bargain. Such recovery was allowed also in *Robinson v. Harman*, 1 Exch. (Eng.) *850, wherein it appears that the defendant had agreed

to grant a valid lease, when he well knew that he had no power to do so. In *Engel v. Fitch*, 3 L. R. Q. B. (Eng.) 314, s. c. 4 L. R. Q. B. (Eng.) 659, damages were allowed because the defendant failed to take the necessary steps, which he could have taken, to put his vendee in possession. In *Bain v. Fothergill*, 7 H. L. Rep. (Eng.) 158 (see Sedgwick, *Leading Cases on Measure of Damages*, 45), *Flureau v. Thornhill* was adhered to and subsequent cases reviewed. It was there said that *Flureau v. Thornhill*, must be taken to be without exception. The value of the English rule, however, is weakened somewhat by the language of Mr. Baron Pollock in *Bain v. Fothergill*, *supra*. He there adheres to the rule of *Flureau v. Thornhill*, but indicates that the doctrine of *stare decisis* should govern such contracts. He says: "All that has been hitherto said leads to the conclusion that the case of *Flureau v. Thornhill* was rightly decided, at the time it was decided, on sufficient legal principles, but if it was a decision to which at the time I could not have acceded, I should, nevertheless, think that a contract of purchase and sale of real property made at this day must be construed to be made on the footing of that decision being correct. All persons who prepare such contracts know of that decision, and that it has been acquiesced in and acted on for a hundred years. The contracts which such persons prepare are, therefore, made with the understanding that, upon failure to make out a satisfactory title, the rule as to damages enunciated in that case will be applied. Then such rule is by intention and understanding of the parties a part of the contract."

The great weight of authority in this country is less liberal to the grantor, and holds him liable, not for mere nominal damages, but for his grantee's loss of profits, or, as commonly stated, his loss of the bargain. "In some jurisdictions there is no deviation from this rule on account of good faith and inability to perform resulting from an unsuspected defect in the vendor's title; there the symmetry of the law relating to sales is preserved." 2 Sutherland, *Damages* (3d ed.), sec. 579. Good faith on

the part of the vendor was held in *Matheny v. Stewart*, 108 Mo. 73, not to excuse or protect him. In *Hammond v. Hannin*, 21 Mich. 374, it was said: "If a party enters into a contract to sell, knowing that he cannot make a title, he is remitted to his general liability, and the exception introduced by *Flurcau v. Thornhill* does not apply. So if a person undertakes that a third party shall convey, and is unable to fulfil his contract, the authorities are that he shall pay full damages. * * * The cases before referred to, in which a party undertook to sell that which he did not own, and knew he could not control, may also, when the other party is not informed of the defect, be considered as involving a degree of bad faith, and have generally been so regarded by the courts." In *Pumpelly v. Phelps*, 40 N. Y. 59, it is said: "The rule that a vendor, who contracts to sell and convey real property in good faith, *believing that he has a good title*, and on discovering it to be defective, for that reason, refuses or is unable to fulfil his contract, is, in an action against him by the vendee for the breach, liable for only nominal damages, should not be in any degree extended, but strictly limited to those cases coming wholly and exactly within it. And where a vendor contracts to sell lands, in which *he knows, at the time, he has not title or the power of conveyance*, he is bound to make good to the vendee the loss of the bargain through his default. Nor, in such case, does it excuse the vendor that he acted in good faith, and believed, when he entered into the contract, that he should be able to *procure* a good title for his purchaser." In *Doherty v. Dolan*, 65 Me. 87, it was held: "This rule of damages is not to be varied, because the defendant, through unanticipated causes which he could not control, although acting in good faith, was unable to convey." 2 Sutherland, *Damages* (3d ed.), sec. 581. See, also, *Vallentyne v. Immigration Land Co.*, 95 Minn. 195; *Arentsen v. Moreland*, 122 Wis. 167, 65 L. R. A. 973; *Flecten v. Spicer*, 63 Minn. 454; 2 Warvelle, *Vendors* (2d ed.), sec. 936.

Where it is possible, and the wronged party demands

it, equity will require a performance of the contract. And where a party by his contract undertakes to convey property and is rendered unable, or refuses to do so, the law will require him to respond in full compensatory damages, and it makes no difference whether he wilfully disregards his contract, or is prevented through no fault of his own from conveying the title called for by his contract. His liability is created by the contract. He agrees to convey. The contract is necessarily reciprocal. Is there any reason in law or in equity for relieving a grantor because he is disappointed in not obtaining title, any more than there could be for relieving a grantee because he had failed, through no fault of his own, in obtaining the purchase price at the appointed time? It was the duty of the defendant and his privilege to provide in his contract against obstacles, and, if he undertakes without this precaution to convey title belonging to another, he does so at his peril. Any other rule would permit one to speculate in reference to the property of another without incurring any liability on his own part, but at the same time bind his grantee irrevocably. The real issue of fact in the case at bar is whether the parties hereto made their contract contingent upon defendant's obtaining the outstanding title. This issue was submitted to the jury under proper instructions. Defendant's theory was not sound in law, nor supported by competent evidence, and the court properly overruled his request for the instruction.

The contract provided for the conveyance of the land with all the improvements placed thereon prior to the making of a certain lease. Plaintiff's evidence of value was given with reference to the land as it stood at the maturity of the contract. Defendant assigns error in the admission of this evidence, because it failed to exclude the improvements made by the tenant. The contract failed to specify the improvements not conveyed. By his answer, defendant alleged that there were certain improvements made by the tenant, who was authorized to remove the same. The evidence discloses that this tenant had re-

moved prior to the maturity of plaintiff's contract. Presumably the improvements had been removed and were not considered by the witnesses who testified as to the value. If such was not the case, it was the duty of the defendant to prove the continued presence of the improvements. In this he failed, but met the issue tendered, and himself introduced evidence as to value without reference to the excepted improvements.

Defendant requested the court to order the jury to view the premises. This the court refused to do, for reasons expressed in his own words as follows: "The court doubts somewhat the matter of sending the jury out of the county and judicial district. For this reason, it being a discretionary matter with the court, the request will be refused." Section 284 of the code provides for a view by the jury of property which is the subject of litigation, or of the place in which any material fact occurred, whenever in the opinion of the court it is proper. There is a conflict of authorities upon this question. Some courts hold that a jury may not be sent beyond the territorial jurisdiction of the court, unless expressly authorized by statute. *Rockford, R. I. & St. L. R. Co. v. Coppinger*, 66 Ill. 510. But a fair interpretation of our statute convinces us that a different rule should obtain here, and that a trial court in its discretion may send the jury to view any property within the state. Section 1119 of the California penal code authorizes the superior court, in the exercise of a sound discretion, to cause a view to be taken by the jury of the place where the offense was charged to have been committed, or in which any other material fact occurred. This was held, in *People v. Busle*, 71 Cal. 602, to authorize a view in any county in the state. Section 7283 of the Ohio Rev. St. has provisions identical with our own, and it was held in *Jones v. State*, 51 Ohio St. 331, that a jury may be sent to any place where a material fact occurred, if within the jurisdiction of the state. We are of the opinion that the court had the power to send the jury to view the premises in controversy, but it does not

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necessarily follow that his refusal to do so was error. The granting of such an order is by statute made discretionary, and it is only where an abuse of such discretion appears that this court will reverse a judgment. The only reason for such an order would be to enable the jury the better to understand the evidence; and in the case at bar, where the issue of fact is confined to the value of the land, we cannot see wherein the jury would have been enlightened by a view of the premises.

For the reasons given above, we recommend that *Reed v. Beardsley*, 6 Neb. 493, so far as it relates to the measure of damages, and those cases following the same rule, be overruled, and that the judgment of the district court be affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: for the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

METTE KRUGER, APPELLEE, v. OMAHA & COUNCIL BLUFFS
STREET RAILWAY COMPANY, APPELLANT.

FILED JANUARY 8, 1908. No. 14,890.

1. **Carriers: INJURY: DUTY OF EMPLOYEES.** When a passenger, a girl under 14 years of age, unaccustomed to riding upon street cars, becomes frightened and frenzied by the negligence of the defendant's servants in carrying such passenger past her known destination, and the conductor knows, or by the exercise of due care and diligence under the circumstances should know, of such passenger's frightened and frenzied condition, and that she is about to leave the moving car, it is his duty to exercise the highest degree of care possible under the circumstances to prevent such passenger from alighting from the moving car. *Chicago, B. & Q. R. Co. v. Martelle*, 65 Neb. 540, examined and distinguished.
2. ———: ———: ———. In such a case, if the conductor fails to exercise the degree of care required of him, and the passenger

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in consequence of such failure receives injuries while alighting from the moving car, the street railway company is liable in damages for the resulting injuries.

3. ———: ———: INSTRUCTIONS. In such a case, it is erroneous to instruct the jury that the plaintiff may recover, even though she was negligent in acting as she did.
4. Instructions examined, and *held* prejudicial.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Reversed.*

John L. Webster and *W. J. Connell*, for appellant.

Arthur C. Pancoast, *contra.*

GOOD, C.

Mette Kruger, a minor, by her next friend, instituted this action against the Omaha & Council Bluffs Street Railway Company in the district court for Douglas county to recover damages for injuries alleged to have been sustained while alighting from one of defendant's street cars. There was a trial to a jury, which resulted in a verdict and judgment for the plaintiff. The defendant appeals.

Two acts of negligence are complained of by the plaintiff: First, that defendant, although informed of and knowing plaintiff's destination, carelessly and negligently failed to stop its car, and carried plaintiff past her known destination; secondly, having caused plaintiff to become frightened and frenzied from fear at being carried past her known destination, that defendant failed to exercise that degree of care required of it to prevent plaintiff from alighting from the moving car. Defendant answered, admitting that plaintiff was a passenger, denied any negligence on its part, and alleged contributory negligence on the part of plaintiff. From the record it appears that Mette Kruger was a girl 13 years and 9 months of age at the time of the injuries complained of; that about 7 o'clock in the evening of the 26th day of October, 1904, she and a girl companion of about the same age were passengers

on one of defendant's street cars going westward on Q street in South Omaha. The destination of the two girls was Thirty-First street. Plaintiff claims that, when the conductor took up their fares at about Twenty-Sixth street, they informed him of their desire to alight at Thirty-First street. The car in which they were riding was one in which the seats ran lengthwise along the side of the car. The two girls sat on the south side of the car near the rear, and were looking out of the car windows to the south. At that time in the evening it was dark. The car failed to stop at Thirty-First street, and the plaintiff observed the lights in a neighboring store, recognized the place, and realized that she and her companion were being carried past their destination. She became alarmed and frightened, hurriedly arose and passed out upon the rear platform of the car, where the conductor was standing, and stepped from the car while in motion, fell to the pavement, and received severe injuries. The conductor observed the plaintiff as she came out upon the platform and stepped from the moving car. Plaintiff contends that she was so alarmed and frightened and in such a frenzied condition that she did not know or realize her danger in alighting from the moving car, and that the conductor was negligent in failing to warn her of her danger and prevent her from leaving the car under the circumstances. Plaintiff's evidence tends to support her contention. The defendant denied that the conductor had been previously informed of the destination of the girls, and denied that he had any knowledge that plaintiff was frightened and alarmed, and alleged that he did warn her against stepping off, by calling to her to wait, that he would stop the car, and that, seeing that she did not heed his warning, he attempted to grab her and prevent her from leaving the car. The evidence as to whether the conductor warned the plaintiff, or that he knew of her destination and her excited condition, or that he attempted to prevent her from leaving the car, is in conflict.

The defendant contends that it was under no obligation

to prevent plaintiff from leaving the moving car, that it owed no duty of preventing passengers from alighting from its moving cars, and that, as a matter of law, it was not liable for the injuries received by the plaintiff, and that the court should have so instructed the jury. We are cited to several cases from other jurisdictions, some of which apparently hold to this doctrine. But the rule in this state is different. *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642; *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448; *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Neb. 161; *Freemont, E. & M. V. R. Co. v. French*, 48 Neb. 638. It is generally held that whether or not one is guilty of such negligence in alighting from a moving car or train as will prevent a recovery for injuries received therefrom is ordinarily a question of fact to be determined by the jury. *Hemmingway v. Chicago, M. & St. P. R. Co.*, 72 Wis. 42. Under some circumstances, jumping or alighting from a moving train has been held such negligence as will defeat a recovery. *Chicago, B. & Q. R. Co. v. Martelle*, 65 Neb. 540. In that case, however, the plaintiff was a man of mature years, and deliberately jumped from the moving train. It did not appear that he was frightened, or that he had lost his self control, but that he deliberated upon the matter and, after deliberation, voluntarily jumped from the moving train. It was held that he was guilty of such negligence and deliberate recklessness as to prevent a recovery. But the case at bar is different. The plaintiff was little accustomed to riding upon street cars, and according to her contention, which finds support in the evidence, she was carried past her destination by the fault of the defendant. It was after dark, and she was frightened and excited, and had no realization of what she was doing or of the danger incident to the alighting from the moving car. It is inferable from the evidence that the conductor was aware of her excited and frenzied condition, and might, by the exercise of that degree of care required of common carriers, have prevented her from leaving the moving car, and thus have avoided the injuries. We think

there is a clear distinction between the duty owed by a common carrier to an infant of tender years and that owed to an adult, and between the duty owed to a passenger who has lost control of his mental faculties, of which the carrier is aware, and that owed to one in full possession of his faculties. When street car companies carry passengers of tender years and passengers whom they know to be of unsound mind, it is only proper that they should be required to exercise a higher degree of care toward them than they would toward passengers of mature years and in possession of their full faculties; and if, by acts of their own negligence, they have caused passengers to become frightened and excited and to be in a measure deprived of their faculties, they cannot consistently and reasonably claim that the passenger is negligent in not exercising the prudence and foresight that they ordinarily would, except for their frightened and excited condition. We think the record in this case clearly makes out such a state of facts as required the submission of the case to the jury; and this court cannot say, as a matter of law, that the defendant was not negligent, or that such negligence did not produce the injuries complained of. The case was one for the determination of the jury under proper instructions.

Defendant also complains of numerous instructions given by the court upon its own motion, and of the refusal of the court to instruct the jury as requested by the defendant. We have carefully examined all the instructions given and refused that are complained of, and find no error except in two instructions given, which we now proceed to consider. By the sixth instruction the court informed the jury that, if the conductor was aware that plaintiff was about to jump from the moving car in time for him to have prevented it, and if he failed to exercise the degree of care required of him in that respect, and if such failure of the conductor was the proximate cause of plaintiff's injuries, the plaintiff might recover, even though they should find "that the plaintiff was guilty of negli-

gence in acting as she did." This instruction, as well as the ninth instruction given by the court, indicates quite clearly that the trial court was applying the doctrine of the "last clear chance," and proceeded upon the theory that, notwithstanding contributory negligence upon the part of the plaintiff, the defendant would still be liable if it could have prevented the injuries to the plaintiff. The doctrine of the "last clear chance" simply means that, notwithstanding the previous negligence of the plaintiff, if at the time the injury was done it might have been avoided by the exercise of reasonable care on the part of the defendant, the defendant will be liable for the failure to exercise such care. *Styles v. Receivers of Richmond & D. R. Co.*, 118 N. Car. 1084, 24 S. E. 740. We think an analysis of the situation in which the parties in the instant case were placed will show that the doctrine of the "last clear chance" can have no application. If the plaintiff was negligent at all, it was because she knew and realized the danger in alighting from the moving car, and the only negligent act of the plaintiff was in stepping from the car. It is evident that no act of the defendant after the plaintiff had been guilty of negligence could have prevented the injuries. To make the doctrine of the "last clear chance" apply, the situation must be such that the plaintiff might avoid the injuries after the plaintiff had by her own act placed herself in a position of peril that was, or should have been, apparent to the defendant. If the plaintiff in this case was guilty of negligence at all, it was in stepping from the moving car with the knowledge and realization of the danger in so doing. If she possessed this knowledge and realization, then the proximate cause of her injuries was her own negligence, and she would not be entitled to recover. As applied to the situation in this case, the only theory upon which the plaintiff can recover is that she did not know and realize the danger in stepping from the moving car. Therefore it follows that her right to recover depends upon the absence of contributory negligence upon her part. The instruction above mentioned

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misstated the law, and permitted the jury to find for the plaintiff upon a state of facts which in law will not sustain a recovery. The ninth instruction states the same proposition of law in a negative manner, and is bad for the same reason.

There are other errors assigned and discussed in the brief of the appellant; but as they are not necessary to a determination of this case, and do not appear likely to arise upon a new trial, we refrain from discussing them. Because of errors in the court's instructions to the jury, we recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

CORA C. KEIL, APPELLEE, v. JOHN L. KEIL, APPELLANT.

FILED JANUARY 9, 1908. No. 15,018.

Divorce: JURISDICTION. The record in a divorce case disclosing that neither of the parties to the action had resided in this state either continuously since the marriage or continuously for six months immediately preceding the filing of the petition, *held*, that the district court was without jurisdiction to grant a divorce.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Reversed with directions.*

J. C. Cook, for appellant.

W. C. Walton and F. Dolezal, *contra*.

Good, C.

This was a suit for a divorce, in which the plaintiff was awarded a divorce and the custody of the minor children of the parties. The defendant appeals.

Among other defenses urged was that the court was without jurisdiction; the defendant averring that at the commencement of the action both parties were residents of the state of Iowa. The parties were married in Nebraska in 1891, and continued to reside in this state until the spring of 1905. The defendant was a minister at the time of the marriage, and exercised his calling at different places in Nebraska for some time after the marriage. The parties finally moved to Blair, where, after preaching for one year, the defendant drifted into other occupations, and for a number of years did not officiate regularly as the pastor of any church. In February, 1905, the parties had some misunderstanding and some personal controversies. The plaintiff claims that the defendant assaulted her and otherwise mistreated her at that time, but they did not separate, but continued to live together as husband and wife. The defendant in April, 1905, received a call from a church in Iowa. It appears that both parties went there when he preached his trial sermon, and defendant was accepted as pastor of the church. They came back to Blair, and made arrangements to move from there to Iowa. They packed up practically all of their household goods and effects; the defendant claimed all, but the plaintiff claimed that some things were left in their home in Blair. The defendant moved to his new pastorate, while the plaintiff visited a few weeks with relatives in Nebraska. About the first of June she, with her children, went to the defendant in Iowa, and there lived with him in their new home until the 23d day of August. During the time that the plaintiff was visiting with her relatives in Nebraska, and while the defendant was preparing a home for them in Iowa, she wrote him a number of letters, which are in the record. These letters do not evince any unkindly feeling between the parties, but, on the contrary, abound in caressing and endearing terms. Without attempting to quote the evidence, suffice it to say that the record discloses to our satisfaction that it was the intention of the

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parties to establish a home in Iowa, and that they did so establish it. In August the plaintiff represented to the defendant that she had received a letter informing her that her mother was seriously ill, and asking her to go at once to her mother. The defendant consenting to her going, took the plaintiff and their children to the railway station, provided her with funds, and parted with them at the station in an affectionate manner. The plaintiff confessed that she never received such a letter, and that it was merely an invention of her own and used as a ruse to get her children away from the defendant and to return to her people in Nebraska. She did not attempt to re-establish her home at Blair, but went immediately to the home of her parents in Dodge county, and within three days brought this action for a divorce.

At the outset of the action she filed an affidavit alleging that the defendant was a nonresident, as a basis for constructive service. It is true that upon the trial of the case she testified that she only went to Iowa temporarily, alleging that the defendant had agreed to treat her in a more kindly manner, and that, relying upon this promise, she agreed to go to him. She claims that he violated his promise, and further illtreated her. The evidence, however, does not disclose any serious fault of the husband after she went to him in Iowa. We are convinced from the record that the plaintiff and defendant both established a home in Iowa in good faith, and intended to make it their future permanent residence. It follows, then, that she could not regain a residence in Nebraska to entitle her to maintain an action for divorce until she had been here for a period of six months. She began the action within three days of her return to Nebraska. It follows that the court was without jurisdiction to grant a divorce to plaintiff in this case, and that the judgment of the district court was wrong, and should be reversed.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with directions to dismiss the action.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to dismiss the action.

REVERSED AND DISMISSED.

ELLIOTT LOWE ET AL., APPELLANTS, V. ST. PAUL FIRE & MARINE INSURANCE COMPANY, APPELLEE.

FILED JANUARY 8, 1908. No. 15,036.

Insurance: CONTRACT: LIABILITY. Where a written application for insurance is made upon a blank form which provides that no liability will attach until the application is accepted and approved at the home office of the company, and the application, together with the premium, is delivered to a soliciting agent of the company who has no authority to make a contract on behalf of the company, and a loss occurs before the application has been received at the home office or by the general agents of the company, and the general agents, having knowledge of the loss, refuse for that reason alone to issue a policy, *held*, that no contract of insurance was created and the insurance company was not liable for the loss.

APPEAL from the district court for Harlan county: ED L. ADAMS, JUDGE. *Affirmed.*

John Everson and Flansburg & Williams, for appellants.

W. P. Hall and Greene, Breckenridge & Matters, contra.

GOOD, C.

Appellants brought this action against the appellee to recover upon an alleged contract of insurance against loss by hail storms to growing wheat in the fields. The defendant answered, denying the making of any contract of insurance. At the conclusion of plaintiffs' testimony the district court directed a verdict for the plaintiffs in the

sum of \$66, representing the amount of the premium paid by the plaintiffs to the defendant, and in effect directing a verdict against the plaintiffs upon the alleged contract of insurance. Plaintiffs appeal.

The record discloses that one O. H. Johnson was the local agent of the defendant at Huntley, Nebraska; that he was a recording agent for the purposes of fire insurance, but was not authorized to issue policies for hail insurance; that as respects hail insurance he was simply a soliciting agent, and had no other authority than to take the applications of persons desiring hail insurance and transmit such applications to the general agents of the defendant, Cowgill & Lyle, at Holdrege, and to collect the premiums and remit them to the general agents. On the 13th of June, 1905, Johnson took plaintiffs' application for \$1,000 of insurance, and received from the plaintiffs the premium of \$60. At that time he informed them that the application must be sent to Holdrege, and that plaintiffs would receive their policy on the following day. The application and premium, less Johnson's commission, were duly forwarded by mail to the general agents. By some error in the United States mail service the letter containing the remittance and the application was sent to Bertrand instead of Holdrege, and was returned thence to Holdrege, and did not reach the general agents until the morning of the 17th of June. On the 15th of June plaintiffs' wheat, that was to have been covered by the policy of insurance, was partially destroyed by hail. Plaintiffs called upon Johnson for their policy, and informed him of their loss. Johnson informed the plaintiffs that he had not yet received the policy from the general agents, and immediately called up by telephone the general agents, at Holdrege, informed them of the loss, and inquired about the policy. The general agents informed Mr. Johnson that no application from the plaintiffs had been received. Two days later, when the application was received, the general agents, being informed of the loss, declined to issue a policy, and directed a return of the draft which had been

forwarded with the application to the plaintiffs. It appears, however, that the premium paid by the plaintiffs was never in fact returned to them. Plaintiffs were informed that the defendant would not issue the policy on account of the fact that a loss had occurred previous to the receipt of the application by the general agents. The application for insurance, signed by the plaintiffs, is in part as follows: "I, Arnold & Lowe, * * * hereby make application to the St. Paul Fire and Marine Insurance Company for insurance upon growing grain against damage by hail only for the season of 1905, to the amount of \$1,000, from the day this application is accepted and approved at the home office of the company at St. Paul, Minn., at 12 o'clock, noon, until September 15, 1905, noon. * * * That I know this application does not bind the company until received and approved at the home office in St. Paul, Minn." It is admitted, however, that the application was to have been acted upon by the general agents at Holdrege, instead of at the home office. The application is identical in form with that involved in the case of *St. Paul F. & M. Ins. Co. v. Kelley*, 2 Neb. (Unof.) 720, and the holding in that case, we think, must be decisive of this. It is apparent from the record that Johnson had no authority to enter into any contract on behalf of the defendant for hail insurance. He was not authorized to make any contract binding upon the defendant. It follows, then, that all that transpired between Johnson and the plaintiffs did not make a contract of insurance that was binding upon the defendant in the instant case until the application was accepted and approved by the general agents at Holdrege. They never accepted and approved the application. They declined to issue the policy prior to the receipt of the application. Neither the general agents at Holdrege, nor any one else authorized to act for the defendant, made or attempted to make any contract of insurance with the plaintiffs, and in law no contract of insurance ever existed between the plaintiffs and the defendant.

Plaintiffs contend that the risk was a proper one, that they paid the full premium demanded by the defendant's agent, and complied with all the demands necessary upon their part to effect a contract of insurance on the growing wheat against loss by hail, and that but for the failure of the postal authorities to promptly deliver the mail the application would have been received by the general agents and the policy would have been issued by them on the 14th of June, and that it is unjust to visit upon the plaintiffs this loss because of the neglect of the postal authorities in delivering the application in time. It may seem to be a hardship to the plaintiffs to bear the loss, but a sufficient answer thereto is that the defendant cannot be held for loss, except upon a contract, and that no contract of insurance existed. The failure to deliver the application on time was not the fault of the defendant, and it could not be compelled to pay for a loss against which it never contracted, simply because it would have contracted to pay the loss but for the failure of the postal authorities to promptly deliver the application.

While the plaintiffs did not ask for judgment, and could not have asked for a judgment, for the return of the premium that they had paid, still the action of the lower court in directing the verdict and entering judgment for the plaintiffs for the amount of the premium, with interest, was not prejudicial to them. It follows that the judgment of the district court should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

**TAMME R. ZIMMERMAN, APPELLANT, v. A. J. TRUDE,
SHERIFF, ET AL., APPELLEES.**

FILED JANUARY 8, 1908. No. 15,046.

1. **Constitutional Law: CLERK OF COUNTY COURT: APPOINTMENT.** Chapter 34, laws 1897, entitled "An act to authorize the county judge in counties where said judge has been previously authorized by the board of county commissioners to employ one or more clerks, to designate and appoint, in writing, one of said clerks to be the clerk of the county court, and prescribing the duties and compensation of the clerk of the county court," examined, and *held* not in conflict with section 11, art. III of the constitution, providing that "no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed."
2. **Judgment: INJUNCTION: PLEADING.** In an action to enjoin the collection of a judgment of the county court on the ground that the judgment is void, it is necessary, in order to state a cause of action, that the averments of the petition should affirmatively state facts which show that the judgment was void.

APPEAL from the district court for Gage county: **WILLIAM H. KELLIGAR, JUDGE.** *Affirmed.*

W. H. Ashby, for appellant.

A. H. Kidd, *contra*.

GOOD, C.

Plaintiff brought this action in the district court against Trude, as sheriff, and Loverin & Brown Company. The object of the action was to enjoin the defendant from levying an execution upon the property of the plaintiff upon the ground that the judgment, upon which the execution was issued, was void. The judgment in question was rendered originally in the county court for more than \$200, and a transcript thereof was filed in the district court, whence the execution issued. The judgment was alleged to be void for two reasons: First, because the summons was neither issued nor signed by the county judge, but was issued by one F. E. Bourne, an assistant in the

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office of the county judge; second, because the defendant was not sued in his full Christian name, but was sued by the name of "T. Zimmerman," and the summons was not personally served upon him, but was served by leaving a copy thereof at the usual place of residence. A copy of the summons is attached to and made a part of the petition. A temporary restraining order was issued and served upon the sheriff. Loverin & Brown Company is a nonresident corporation, and no service was had upon it, and no appearance was made by it in the action. The sheriff appeared in this action, and moved to dissolve the temporary restraining order upon the grounds, first, that the petition did not state facts sufficient to authorize the issuing of the same; and, second, that the facts set forth in the petition were untrue. This motion was heard upon affidavits previous to the return day of the summons, and the court sustained the motion, dissolved the restraining order, and entered a judgment dismissing the petition. From this judgment the plaintiff appeals.

No answer or demurrer had been filed to the petition by the defendant Trude, and the record itself does not disclose that the cause was submitted to the court for determination, except upon the motion. On the oral argument in this court, however, it was conceded by both parties that the whole case was submitted to the trial court for decision upon the record. We are unable to determine from the record whether or not it was the intention of the parties, in submitting the case to the district court, that the evidence offered by way of affidavits upon the hearing of the motion to dissolve the restraining order should be considered as evidence upon the trial of the principal cause. We are inclined to the view, however, that it is immaterial what their understanding was in that respect, because of the fact that no answer or demurrer was filed to the petition, and all the facts well pleaded in the petition must be taken as true. It therefore becomes necessary to determine whether or not the petition states a cause of action.

In the action in the county court, wherein the judgment was rendered against the plaintiff, the summons was signed, "H. E. Spafford, County Judge, by F. E. Bourne, Clerk," and was attested by the seal of the county court. Plaintiff contends that chapter 34, laws 1897, which is entitled "An act to authorize the county judge in counties where said judge has been previously authorized by the board of county commissioners to employ one or more clerks, to designate and appoint, in writing, one of said clerks to be the clerk of the county court, and prescribing the duties and compensation of the clerk of the county court," is unconstitutional, and that there was, therefore, no authority for any one to act as clerk of the county court, or to issue the process of said court, except the judge thereof. Plaintiff contends that said act is in violation of that portion of section 11, art. III of the constitution, providing that "no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." Plaintiff claims that the act is an attempt to amend sections 8 and 20, ch. 20, Comp. St. 1895. A portion of section 8 is as follows: "In all cases commenced in said courts wherein the sum exceeds the jurisdiction of a justice of the peace, it shall be the duty of the county judge to issue a summons." Section 20 is as follows: "All writs, citations, and all process in civil actions issuing out of any probate court, shall be under the seal thereof, and be signed by the probate judge." It is clear that by the sections above quoted it was made the duty of the county judge, as the law then existed, to issue and sign the summons, but by section 1, ch. 34, laws 1897, it was provided that in counties where the county judge had been previously authorized by the board of county commissioners to employ one or more clerks, such county judge might designate one of said clerks to be the clerk of the county court, and by section 3 of said act such clerk of the county court was authorized to sign and seal all processes issued out of the county court, and to do all other acts to be done

by the county judge, except judicial acts. There is apparently a conflict between sections 8 and 20, ch. 20, Comp. St. 1895, and the provisions of chapter 34, laws 1897. By an examination of chapter 34 it will be observed that it does not purport to be an amendatory act, but is an act complete in itself, and its object is clearly expressed in the title, to authorize the appointment of a clerk of the county court in certain instances, and prescribing their duties and compensations.

Where an act is complete in itself, and does not purport to be an amendatory act, although the provisions of the act may be in conflict with other provisions of the statutes, this court has held that the act is not in conflict with that clause of the constitution above referred to. In *State v. Cornell*, 50 Neb. 526, it was held that an act complete in itself is not inimical to the constitutional requirement that no law shall be amended unless the new act contains the section or sections so amended, although such complete act may be repugnant to or in conflict with a prior law not referred to nor in express terms repealed by the latter act. Other cases that hold substantially to the same doctrine are *Canham v. Bruegman*, 77 Neb. 436; *State v. Omaha Elevator Co.*, 75 Neb. 637, and *State v. Drexel*, 74 Neb. 776.

In the latter case it was held that the repealing clause of an act of the legislature, repealing "all acts and parts of acts in conflict herewith," only repeals such acts of the existing statutes as are so repugnant to the act last passed as that both cannot stand. Prior statutes are repealed *pro tanto*, and to the extent only that they conflict with the act last passed. Section 5, ch. 34, laws 1897, above referred to, is as follows: "All acts or parts of acts in conflict with this act be and hereby are repealed." Applying the doctrine laid down in the case last above cited, it would follow that the passage of chapter 34, laws 1897, would have the effect of repealing or modifying sections 8 and 20, ch. 20, Comp. St. 1895, to the extent that they required the personal act of the county judge in issuing or

signing the processes of the county court. We conclude, therefore, that chapter 34, *supra*, is valid, and authorizes the clerk of the county court to issue and sign the summons.

The summons issued from the county court commanded the officer to summon "T. Zimmerman, whose first name is unknown to the plaintiff," and the return to this summons shows that it was served by leaving a copy at the usual place of residence of the appellant. Plaintiff contends, that the summons was issued pursuant to the provisions of section 148 of the code, which reads as follows: "When the plaintiff shall be ignorant of the name of the defendant, such defendant may be designated in any pleading or proceeding by any name and description, and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition, that he could not discover the true name, and the summons must contain the words 'real name unknown,' and a copy thereof must be served personally upon the defendant." It is urged that, under the decision in the case of *Encold v. Olsen*, 39 Neb. 59, personal service was required in order to give the court jurisdiction, and that the summons, showing that it was left at the usual place of residence, was sufficient to show that the court did not acquire jurisdiction. This contention could have no application, however, where the action was brought upon a written instrument, where the parties thereto had executed the same by signing the initial letter or letters or some contraction of the Christian name. Section 23 of the code provides that, in such a case, it shall be sufficient to designate such person by the name, initial letter or letters, or contraction of the full name or names, instead of the Christian, or first, name or names in full. It must be borne in mind that this was an action in the county court for more than \$200, and was a term case, and that in such cases the county court is a court of record, and all presumptions are to be indulged in favor of the regularity of its proceedings and judgments.

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The summons discloses that the action was for money due and unpaid upon a certain guaranty, and the presumption would be, in the absence of a showing to the contrary, that the action was based upon a written instrument, and that the defendant in that case was properly sued by the initial, because he had signed the written instrument in that manner. We think it would be incumbent upon the plaintiff to allege facts sufficient to show, not only that the county court might not have had jurisdiction, but to allege facts sufficient to show to a certainty that the court did not have jurisdiction, and, in the absence of the averments to the contrary, the presumption would be in favor of the jurisdiction of the county court.

Plaintiff's petition was defective in another particular. He does not allege anywhere in his petition that no appearance was made by him in the case in the county court, and, for aught that appears in his petition, he may have appeared and made a defense in the action in the county court. The presumption being in favor of the regularity of the proceedings and judgment of the county court, the plaintiff in this case must fail, unless he avers facts sufficient to show affirmatively that the court was without jurisdiction. This he has not done.

It follows that the judgment of the district court was right and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

HEENAN & FINLEN, APPELLEES, v. THOMAS E. PARMELE
ET AL., APPELLANTS.*

FILED JANUARY 8, 1908. No. 15,088.

1. **Specific Performance: PARTIES.** A contract for the sale of real estate, executed by and between T. E. P. and C. C. P., as vendors, and H., as vendee, will not sustain an action for specific performance by H. & F., a copartnership, against the vendors as trustees of an expired corporation, when the contract does not disclose that the vendors were acting in any other capacity than as individuals.
2. **Vendor and Purchaser: DESCRIPTION.** A contract for the sale of real estate that does not describe the land or refer to it in such a way as to render it possible to ascertain the exact description is void for uncertainty.

APPEAL from the district court for Custer county:
BRUNO O. HOSTETLER, JUDGE. *Reversed.*

Byron Clark, for appellants.

J. R. Dean and Hainer & Smith, contra.

GOOD, C.

This is an action to enforce specific performance of a contract for the conveyance of lands in Custer county, Nebraska, and is before this court a second time. The former opinion, entitled *Parmele v. Heenan & Finlen*, appears in 75 Neb. 535. After the cause was remanded upon the former hearing in this court to the district court, an amended petition was filed, alleging, among other things, that since the former trial the copartnership of Heenan & Finlen had been dissolved, and that Daniel H. Heenan had succeeded to all rights of the copartnership, and making Heenan in his individual capacity a joint plaintiff with the copartnership of Heenan & Finlen. The amended petition also averred that the existence of the defendant Plattsmouth Live Stock Company had expired on the

* Rehearing allowed. See opinion, p. 514, *post*.

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first of January, 1900, in accordance with the limitation contained in its articles of incorporation, and that the defendants, Thomas E. Parmele and Charles C. Parmele, had complete charge and direction of the affairs and business of said corporation on the date of its expiration, and that they were the persons acting last before the expiration of its charter as its officers and managers, and that by operation of law they became trustees for the corporation with full powers and authority to sell and dispose of the property of the corporation. After objections to the jurisdiction of the court were filed on behalf of the defendants and overruled, the defendants answered, and trial was had, resulting in a decree for the plaintiffs. The defendants appeal.

At the outset it may be remarked that numerous assignments of error are made that are ably and exhaustively presented in the arguments and briefs on either side, but the view we have adopted will render a consideration of the most of them unnecessary. The contract relied upon is evidenced by a series of letters passing between Daniel Heenan on one side and Thomas E. Parmele and Charles C. Parmele on the other. The substance of most of these letters is set out in the former opinion in this case. The evidence discloses that the record title to the land was in the name of the Plattsmouth Live Stock Company, and that Thomas E. Parmele and Charles C. Parmele were the last acting managers of the corporation prior to the expiration of its charter, and they became the trustees of the corporation under the provisions of section 62, ch. 16, Comp. St. 1905. The evidence also discloses that at least two other parties than the two defendant Parmeles were holders of stock in the corporation and beneficially interested in the land; that the plaintiff Heenan & Finlen was a copartnership conducting a ranch business in Custer county, and owned a large quantity of land; that the land in controversy, together with some other land of the defendants, lay within the Heenan & Finlen ranch, and almost entirely surrounded by the land of Heenan & Finlen.

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The first negotiations looking to a purchase of the land was in a personal interview between Heenan and Thomas Parmele in the fall of 1900. Nothing came of this conversation, except, perhaps, to identify as between the parties the land that was being negotiated for. The next step was the writing of a letter by Thomas E. Parmele to Heenan, stating that the land had not been sold and fixing a price thereon. April 3, 1901, Heenan sent the following answer: "Yours of the 1st inst. to hand, and note that you have not sold the land. I think your price is too high, but if you will accept \$1,000, cash, I will try and raise the money and buy them. This is the price that it was offered to my brother some time ago. If you will accept would like to know at once. Very truly, D. Heenan." April 6, 1901, Thomas Parmele answered this letter, as follows: "Mr. D. Heenan, Streator, Ill. Dear Sir: Replying to your letter, I will take \$1,000 for the land as per your offer. Let me hear from you. Yours very truly, Thomas E. Parmele." Heenan answered this letter, but the letter has been lost, and oral evidence of its contents is given; Heenan and his confidential clerk, upon the one hand, testifying that Heenan directed a deed to be made to Daniel H. Heenan and Thomas W. Finlen, who were the persons composing the copartnership of Heenan and Finlen, and directed Parmele to send the deed and abstract to the National Bank of the Republic at Chicago, where the consideration would be paid. The next letter in the record is dated May 25, 1901, written by Charles C. Parmele, as follows: "Mr. Dan Heenan, Streator, Ill. Dear Sir: I have made draft on you for \$1,000 and sent to the National Bank of Republic at Chicago, attached to abstract and deed to half section of land in Custer county. The title to this land is all right with the exception of a tax deed issued on a quarter of the land for the 1893 and 1894 taxes, amounting to \$21.50 and interest. I will get a quitclaim deed from the party that holds this land, and will guarantee you that we will straighten this up. The abstract shows two unreleased mortgages from Samuel

Pollock and wife to the Iowa Mortgage Company. Also mortgage from Chas. W. Nix and wife to S. H. Atwood. These mortgages were both paid off several years ago. We obtained releases, but never have filed them. I have forwarded releases today to register of deeds of Custer county, for record. You please notify the bank to pay draft and we will guarantee title. Very truly yours, Chas. C. Parmele." Thereafter, at the solicitation of Parmele, the deed and abstract and draft were returned to him by the National Bank of the Republic. By an examination of these letters, it will be observed that nowhere in the letters is there any reference to the fact that Mr. Heenan was acting for the copartnership, unless it might be inferred from the letter which Heenan claims was written directing the deed to be made to the individual members of the copartnership. The Parmeles deny that any such direction was contained in the letter. It will also be observed, by reference to the letters, that nowhere is there anything to indicate that the title to the land was in the name of the Plattsmouth Live Stock Company, or that either of the Parmeles was acting as trustee for the expired corporation. The action was instituted in behalf of the copartnership, and recovery is sought against the Parmeles in their capacity as trustees. The contract does not purport to be made by the partnership on the one hand and the trustees of the expired corporation on the other. In *Morgan v. Bergen*, 3 Neb. 209, it is said: "Such a contract, to be obligatory upon the *principal* when made by the agent, must be made in the name of the *principal*; if the agent contract in *his own name*, or describes himself as agent for the principal, the *contract is the contract of the agent*, and not of the principal." In *Persons v. McDonald*, 60 Neb. 452, it is said: "A contract, to be binding upon a principal when executed by another person, must be made in the name of the principal. If one contract, in his own name, describing himself as attorney for his principal, the contract is the obligation of the attorney, and not of the principal." Applying this rule, it would follow that this

contract is the contract between Heenan individually and the Parmeles as individuals.

By reference to the letters constituting the alleged contract, it will be observed that nowhere in them is there contained a description of the land to be conveyed. The only statement relating to the location of the land is that it is in Custer county. It is no doubt true that both Heenan and the Parmeles knew and understood what land was referred to, but the contract itself does not disclose it, nor is there anything in the contract from which the land could be identified. A complete contract, binding under the statute of frauds, may be executed by means of letters passing between the parties, but such a contract, or memorandum thereof, to be valid and convey land, must either describe the land or refer to it in such a manner that, by the aid of the contract, or memorandum, one not a party to it can, by resorting to parol testimony, definitely ascertain the land intended to be conveyed. It is not essential that the description have such particulars and tokens of identification as to render a resort to extrinsic aid entirely needless. The terms may be abstract and of a general nature, but they must be sufficient to fix and comprehend the property which is the subject of the transaction, so that with the assistance of external evidence the description, without being contradicted or added to, can be connected with and applied to the very property intended to be conveyed and to the exclusion of all other property. *Ryan v. United States*, 136 U. S. 68. Where a sufficient description is given in the contract, parol evidence may be resorted to in order to fit the description to the thing, but where an insufficient description is given, or where there is no description, such evidence is inadmissible. *Ferguson v. Blackwell*, 8 Okla. 489, 58 Pac. 647; *Halsell v. Renfrow*, 14 Okla. 674, 78 Pac. 118. It has been held, in *Ruzicka v. Hotovy*, 72 Neb. 589, that a memorandum of a contract of sale which fails to specify which quarter of a named section of land is intended, and states

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the number of the range without specifying whether it is east or west, is not void under the statute of frauds for uncertainty in description, if the description is otherwise specific and the land intended to be conveyed can be identified from the description with the aid of parol testimony. Under the rule of law above quoted, we think the description in the contract is too indefinite and uncertain to be susceptible of enforcement.

For the reasons given, we recommend that the judgment of the district court be reversed and the cause remanded.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

The following opinion on rehearing was filed November 6, 1908. *Former judgment of reversal vacated and judgment of district court affirmed:*

1. **Partnership: DISSOLUTION: PARTIES: SUBSTITUTION.** After the dissolution of a partnership, the partner to whom is assigned a right of action of the partnership and the right to the property which is the subject of the action may be substituted or admitted to become a party plaintiff for the purpose of carrying on the suit.
2. **Corporations: DISSOLUTION: ACTION: PROCESS.** Under section 4112, Ann. St. 1907, a dissolved corporation may be sued in the corporate name and service made upon the trustee or person in charge of the assets.
3. **Pleading: AMENDMENT: CAUSE OF ACTION.** Where the original action is brought against a corporation in its corporate name and certain persons alleged to be its officers, for the specific performance of a contract to convey real estate made by the alleged officers for the corporation, an amendment to the petition, pleading that at the time the contract was made the corporation was dissolved and some of the defendants were the trustees thereof, does not change the cause of action.
4. **Statute of Frauds: SALE OF LAND: MEMORANDUM.** If a contract for the sale and purchase of real estate can be ascertained from the entire correspondence between the parties, together with an ab-

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stract of title containing the description of the premises transmitted for inspection to the vendee and referred to in the correspondence, this will be a sufficient memorandum in writing to satisfy the statute of frauds.

5. **Corporations: DISSOLUTION: SALE OF LAND.** Under the facts set forth in the opinion, *held*, that one C. was the last acting manager of a dissolved corporation, and was therefore sole trustee and competent to sell and convey the real estate of the corporation.

BARNES, C. J.

The facts in this case are set forth in the former opinions, *Parmele v. Heenan & Finlen*, 75 Neb. 535, and *Heenan & Finlen v. Parmele*, *ante*, p. 509. At the second trial amended pleadings were filed and additional evidence offered to supply the deficiencies pointed out in the first opinion.

1. The first point made in the appellants' brief is that a partnership cannot maintain an action for specific performance of a sale of real estate, and it is contended that this action is brought by the partnership. The title of the case in the petition is "Heenan & Finlen, a copartnership, v. Thomas E. Parmele, Charles C. Parmele, Samuel H. Atwood, Guy Seivers, and the Plattsmouth Live Stock Company," and in the body of the petition it is alleged that Heenan & Finlen is a partnership composed of Daniel H. Heenan and Thomas W. Finlen, organized for the purpose of doing business in Nebraska. With the pleading in this form there can be no question but that the action is brought by the partnership under the statutory permission. The additional evidence produced at this trial satisfied the district court, as it does this court, that the negotiations for the land were carried on by Mr. Heenan for and in behalf of the copartnership. Whether the deed was directed to be made to the individual copartners, as he and his clerk testify, or to Heenan individually, as seems to be implied by the testimony on behalf of the defendant, is under the peculiar circumstances of this case immaterial. It seems clear that the title was to be taken for the benefit of and in behalf of the copartner-

ship. It is the real party in interest, and it has the right to maintain an action for the specific performance of a contract to convey the land. If there be a defect in the title of the partnership to the property after the conveyance is made, as is urged by the defendants, it can neither help nor harm them, and they cannot be heard to say that for this reason the partnership may not maintain this action.

2. After this case was remanded to the district court, Daniel H. Heenan was made a party to the suit upon a showing that he had succeeded by assignment to all the rights of the copartnership, and an amended petition was filed making him a party. It is now objected that this amended petition changes the parties and the cause of action, and that no summons was served upon the amended petition. Separate special appearances were made by the defendants, objecting to the jurisdiction of the court on that account, which were each overruled. It is contended that the original action was by the copartnership against the live stock company, while the amended petition seeks to recover the individual rights of Heenan as against the Parmeles and Atwood in their capacity as trustees of the live stock company, its charter having expired by limitation upon January 1, 1900. While under section 45 of the code the action after the dissolution of the partnership might have been continued in the same name, yet it was entirely proper for the fact of the change of interest to be shown, and the pleadings made to correspond to the actual facts by making Heenan a party in his capacity as successor to or assignee of the rights of the copartnership. No right is claimed on the part of Heenan not derived by his succession to the interests of the partnership, hence, there is no change in the cause of action on that point.

As to the objection to the amendment seeking to charge the individual defendants as trustees of the Plattsmouth Live Stock Company, it had come to light since the former hearing that the corporate powers of the company had expired by limitation at the time the contract was made.

The statute, section 4112, Ann. St. 1907, expressly provides that a dissolved corporation may be sued in the corporate name and service made upon the trustees or persons in charge of the assets. The liability of the individual defendants as to the branch of the case seeking specific performance could only be predicated upon the liability of the corporation. In the original petition it was only sought to charge the Parmeles in this respect as officers of the corporation, and this is all that is sought to be done by the amended petition. We think there is no substantial change either in the parties or in the cause of action, and that no new summons was necessary to be served upon any of the defendants.

3. Further consideration of the evidence contained in the record convinces us that our former holding that the description of the land in the contract is too indefinite and uncertain to be susceptible of enforcement is erroneous. The evidence is clear that the oral negotiations leading up to the written correspondence referred specifically to the land in controversy which was situated within the Heenan & Finlen pasture, and that this was the identical tract which was in the minds of the parties throughout the correspondence. Accompanying one of the letters was a warranty deed and an abstract of title to the land for the vendees' inspection. The deed was returned to Parmele apparently without having been inspected by Mr. Heenan or any one for him, but the evidence shows that the abstract was forwarded to Streator, Ill., where he resided, seen by the witness Berry, and examined by a firm of lawyers at that place for Mr. Heenan. An abstract is in the record, which is said in the plaintiff's brief to be this abstract, but we find no proof of this fact, except certain marks which might imply this to be the fact. Berry testifies that the description of the land in the abstract sent was the same as that of the land in controversy. The testimony of both Thomas E. Parmele and Charles C. Parmele, the writers of the letters, is positive that the land described in the petition is the land referred to in the

correspondence. We think that the entire correspondence, including the accompanying papers referred to therein, must be construed together, and that the description of the land in the abstract, when considered in connection with the letters, supplies the definiteness of description required by the statute. The case may be distinguished from *Wier v. Batldorf*, 24 Neb. 83, and is similar to *Thayer v. Luce*, 22 Ohio St. 62, in this, that, while in that case the deed, in this case the abstract containing the description, was sent with a letter and submitted to the grantee for his inspection. This satisfies the statutory requirement. *Colliger v. Davis*, 72 Neb. 887.

4. The point in the case which has given us the most concern is as to the power and authority of the Parmeles, or either of them, to act for the Plattsmouth Live Stock Company. The district court found that Charles C. Parmele "is and was the sole trustee of said Plattsmouth Live Stock Company." The correctness of this finding is vigorously assailed. The evidence shows that the last election of officers of the corporation took place in 1892, at which time Charles E. Parmele was elected secretary. At that time five directors were elected, one of whom was Samuel H. Atwood, one of the original defendants in this case. Before the death of Charles H. Parmele, the father of Thomas E. and Charles C., who died in 1897, he had acquired by purchase all of the stock of the corporation, except a few shares purchased from him by Atwood, which were pledged to him as security for the purchase money. No certificates of stock had ever been issued. Some time previous to the 1st of January, 1900, the date of dissolution, all the personal property of the company had been disposed of, and its only remaining assets consisted of real estate. Apparently the last act of management or control exercised over the real estate before the sale was by Charles C. Parmele, in 1898 or 1899, when he agreed that Heenan & Finlen might use the land in controversy if they paid for the use of it. Charles H. Parmele left as his children and heirs, Thomas E. Parmele,

Charles C. Parmele, Mrs. Atwood, the wife of defendant Atwood, and Mrs. Agnew. With respect to the relation of Mr. Atwood to the corporation, Charles C. Parmele testifies: "The facts are these: My father, Charles H. Parmele, president and a stockholder in the Plattsmouth Live Stock Company, died in 1897. Mr. Atwood, my brother Thomas E. and myself were the administrators of his estate. At the time of my father's death Mr. Atwood owed my father for his entire interest in the Plattsmouth Live Stock Company, which was represented by note or notes, and the Atwood stock was pinned as collateral to the note. Shortly after father's death we made an arrangement among the heirs, by which the estate took the Atwood stock and canceled his note. Mr. Atwood, however, being administrator, acted on behalf of the estate and is still so acting. The stock, however, was taken out of the estate and settled by the heirs among themselves, and this settlement among the heirs was prior to 1901." Thomas E. Parmele testified that he heard the testimony of his brother as to the ownership of stock and transaction of the business of the Plattsmouth Live Stock Company, and that his brother stated the facts as he understood them; that, at the time of the negotiations with Mr. Heenan, he and his brother Charles owned all the stock and interest in the Plattsmouth Live Stock Company, except the interest which their mother had in the stock formerly held by his father. He further testifies: "Q. You do not know of Mr. Atwood acting for the company in any way since his individual shares were turned over to the estate? A. No, sir." He further testifies that shortly after his father's death an adjustment was reached among all the heirs of his father, by which the shares of stock in the company were set off to the heirs individually. He further testifies: "Q. Is it not true that, after this time when you made this arrangement with the heirs, you and your brother Charles C. Parmele, who has just testified, were given charge by the others of your family interested in your father's estate and that you transacted all of the

business connected with the Plattsmouth Live Stock Company? A. Yes, sir." On redirect examination Charles C. Parmele further testified: "Q. Mr. Parmele, you and your brother Thomas E. have had charge of the affairs of the Plattsmouth Live Stock Company for several years, and since about 1900, exclusively, have you not? A. Yes, sir." It is true that other evidence given by the Parmeles tends to contradict these statements, but we think the trial judge was justified in believing the statements made against their own interest. As to this and some other matters the evidence of the Parmeles is confusing and contradictory, and, while Mr. Atwood testifies that he has never resigned or refused to act as a director or trustee, we think the evidence shows that with the surrender of his stock he actually surrendered his directorship and neither considered himself nor was considered by the stockholders a director thereafter; that he took no further part in the affairs of the corporation and that Charles C. Parmele was the "last acting manager." After the stock was "taken out of the estate," as the witnesses express it, the Parmele family owned the entire interest, and the two brothers controlled the affairs of the corporation; Charles C. Parmele being the sole trustee and the only person legally authorized to bind the corporation. That this was his own idea is shown by the fact that in none of the transactions did he consult Mr. Atwood, and that he procured to be executed a warranty deed of the corporation without Atwood's knowledge or cooperation, which he sent with his letter to Chicago.

We conclude that the finding of the district court as to the facts is sustained by the evidence, and it will not be disturbed.

The former judgment of the court is vacated and set aside, and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

CHARLES R. HANNAN, APPELLEE, v. CATHERINE RIHNER ET
AL., APPELLANTS.

FILED JANUARY 8, 1908. NO. 15,041.

Mortgages: FORECLOSURE: ESTOPPEL. When, in an action to set aside a conveyance of land as having been fraudulently procured, the plaintiff obtains a decree in his favor by means of a compromise and settlement, in which he agrees to pay and discharge a mortgage upon the premises executed by his fraudulent grantee, he is not entitled to object, in a subsequent action to foreclose that mortgage, that the same is for a sum in excess of the just indebtedness of the mortgagor to the mortgagee, or that prior to the settlement the mortgagee might have obtained a partial satisfaction from a source other than the land.

APPEAL from the district court for Sarpy county:
GEORGE A. DAY, JUDGE. *Affirmed.*

Charles Battelle and J. J. Hess, for appellants.

Will H. Thompson, contra.

AMES, C.

In October, 1904, one Peter B. Jacobs obtained from one Samuel Rihner a conveyance of a tract of land in Sarpy county in this state, upon which he afterwards executed a mortgage as security for an indebtedness to the plaintiff in this action for the sum of \$2,100 represented by a note given by Jacobs to the plaintiff for that amount. Still subsequently, the heirs at law of Rihner, in an action begun by him, procured a decree setting aside the conveyance as having been fraudulently obtained and quieting the title in themselves. To that proceeding the plaintiff in this action, which is for the foreclosure of that mortgage, was not a party, but the decree above mentioned was entered upon a compromise and settlement by which the plaintiffs therein promised to assume and pay the mortgage indebtedness now in suit. It is now contended that the instruments in suit were given in whole or in part in consideration of a

former indebtedness on account of which Jacobs did not obtain credits, aggregating \$40, to which he was entitled, and that prior to the entry of said decree the plaintiff had a lien on a fund belonging to Jacobs, and amounting to \$236.50, which he was entitled to appropriate toward the payment of the debt now in suit, but that he negligently or wrongfully omitted to make such appropriation. The trial court declined to allow these items, or any of them, as credits upon or in reduction of the mortgage debt, and rendered a decree of foreclosure for the full amount of the latter with interest. The defendants appealed.

We think the trial court did not err. The compromise and settlement of the former litigation, resulting in a decree quieting the title of the plaintiffs (defendants herein), was a sufficient consideration for their promise to pay the obligation now in suit, and whether that obligation is just as against Jacobs, or whether the payment then made will be in whole or in part for his use or benefit, is a matter in which they have no concern. Neither the one case nor the other would absolve them from their own agreement, which was, in effect, to discharge the lien of the mortgage according to its terms.

We therefore recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JENNIE BOCK ET AL., APPELLANTS, V. AVIS S. PORTERFIELD,
APPELLEE.

FILED JANUARY 8, 1908. No. 14,999.

1. **Boundaries.** Fixed monuments and boundaries actually marked upon the ground by the government surveyors, when established, control the distances stated in the notes of such survey.
2. ———: **EVIDENCE.** It is a general rule that only a preponderance of evidence is required to establish an issue in civil actions; and boundary disputes furnish no exception to this rule.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

H. M. Sinclair and J. M. Easterling, for appellants.

John N. Dryden, contra.

CALKINS, C.

The plaintiffs were the owners of the south half of the northeast quarter of section 8, in town 8, range 16 west, while the defendant was the proprietor of the land adjoining this tract on the south. The plaintiffs claimed that the defendant had encroached upon their premises, and brought this action in ejectment to recover possession of a strip across the north side of the land in possession of the defendant 4.24 chains wide at the east end. It appeared from a survey made by the county surveyor according to the field notes of the government survey that the southeast corner of the plaintiffs' said land should have been located at the southeast corner of the strip in controversy; but the defendant claimed that the original government stake had been set at the northeast corner of the said strip, and that the north line of the same was the true boundary between the adjoining proprietors. A jury was waived and a trial had to the court, who found for the defendant. From a judgment rendered upon this finding, the plaintiffs appeal.

1. This court is fully committed to the doctrine that fixed monuments and known corners govern both courses and distances. *Johnson v. Preston*, 9 Neb. 474; *Minkler v. State*, 14 Neb. 181; *Thompson v. Harris*, 40 Neb. 230; *Clark v. Thornburg*, 66 Neb. 717; *Bridenbaugh v. Bryant*, 79 Neb. 329. The only question, therefore, that is presented by this appeal is whether the evidence tending to establish the original government corner at the northeast corner of the disputed strip was sufficient to sustain the finding of the district judge. The land was surveyed in 1877, and Mr. Lantz, who took a homestead on the southwest quarter of the same section in 1878, and lived there for 8 years, was called as a witness. He testified that when he settled on this section the government monuments at the corners were fresh and plain; that he became well acquainted with the corner in dispute soon after his settlement, and continued to be familiar with its location during his residence upon the section. He identifies the monument at the northeast corner of the strip in dispute as marking the location of the original government stake. He testifies to breaking out land near this line in 1880, at which time a house was located in the vicinity of this corner; and he verifies the location at the time of the trial by marks showing where the house stood. Before Mr. Lantz removed from his homestead, and in 1884, Elizabeth Karn established a residence on the adjoining quarter, where she remained until 1897; and she identifies the corner as claimed by the defendant as then existing in its present location. She is corroborated by her husband, who testifies to practically the same facts. In addition to this, it appears that the owners of the adjoining lands recognized this corner. The testimony of these witnesses is in no way contradicted; but the plaintiff urges that the testimony of the Karns should be disregarded, because they describe the monument as having four pits, instead of two. It must be remembered that the Karns did not become acquainted with the monument until 7 years after it was installed, and that the identification of the location

of the original monument depends on the testimony of Mr. Lantz, while that of the Karns shows that the monument claimed by the defendant to mark the site of the original stake continued to exist in the same place during their occupancy.

2. The plaintiffs contend that the field notes are to be accepted as presumptively correct, and can only be overcome by the most clear and satisfactory evidence; and, in support of this proposition, cite the case of *Hanson v. Township of Red Rock*, 4 S. Dak. 358, 57 N. W. 11. Under the rule adopted by this court and above stated, the real question is where the boundaries were marked upon the ground by the original surveyors, and not where they should have been located. To establish the fact that such boundary was originally marked at a certain point, the testimony of witnesses who saw the original monuments when new, and the circumstance of the recognition of boundaries by early settlers when such boundaries were easily distinguishable, should be weighed and considered. If it appears from the field notes that the boundary should have been placed differently, that fact must also be considered and given the weight to which it is, according to the general experience of mankind, entitled; and, from a preponderance of all the evidence, the jury, or, when the case is tried to the court, the judge, should determine where the boundary was originally marked upon the ground. It is a settled rule in this state that only a preponderance of evidence is required to establish an issue in civil actions, and cases of this kind are no exception to the rule. In this case, however, we are not only satisfied that the finding of the district court is supported by sufficient evidence, but that it was the only conclusion at which it could have properly arrived.

We therefore recommend that the judgment of the district court be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOSHUA M. GRAY, APPELLEE, v. CITY OF OMAHA ET AL.,
APPELLANTS.

FILED JANUARY 8, 1908. No. 15,010.

1. **Cities: IMPLIED POWERS: SIDEWALKS.** Where there is no express power granted to a city to license or regulate the business of constructing artificial stone, asphalt or other composite walks, it cannot be implied from the grant of authority to construct and repair walks of such material and in such manner as the mayor and council may deem necessary.
2. ———: **ORDINANCES: VALIDITY.** The provisions of an ordinance to license and regulate the business of constructing artificial stone, asphalt and other composite walks examined, and found unreasonable and void.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

H. E. Burnam, I. J. Dunn and John A. Rine, for appellants.

Nelson C. Pratt, contra.

CALKINS, C.

An ordinance of the city of Omaha made it unlawful for any person to construct artificial stone, asphalt or other composite walks without a license therefor. Section 2 of this ordinance, which contained its material provisions, was as follows: "Any person, firm or corporation desiring to engage in the construction of artificial stone, asphalt or other composite sidewalks in the city, shall be required to apply for a license to the mayor and city council; such license to expire on December 31st of each year. The condition of the issuance of such license to be the payment of ten dollars to the city treasurer and the filing with the city clerk of a surety bond to the city of Omaha, in the sum of \$2,000, to be approved by the mayor and city council, guaranteeing the construction of all such walks in conformity with approved specifications of the

city, and their maintenance for five years in continuous good condition; said bond shall also indemnify the city against all damages arising by virtue of neglect to comply with the provisions of ordinances and to take and provide for necessary precautions against damages by virtue of such construction. All such walks to be constructed under permits and in full accordance with provisions of ordinances." The plaintiff, who had not complied with the provisions of this ordinance, was employed by the owner of a lot in said city to lay a cement sidewalk in front of such lot; and, while engaged in the construction of the same according to the specifications of the city for the laying of walks of that character, he was arrested under a complaint charging him with engaging in the business of laying cement sidewalks without a license, in violation of the ordinance in question. The plaintiff brought this action to restrain the city, its officers and agents, from attempting to enforce said ordinance against him, on the ground that the ordinance was unreasonable and void, and unauthorized by the charter of the city. The defendants demurred to the petition, which demurrer was overruled, and, the defendants not desiring to answer, a judgment for the plaintiff was rendered, from which the defendants bring this appeal.

The power to pass a city ordinance must be vested in the governing body by the legislature in express terms, or be necessarily or fairly implied in and incident to the powers expressly granted, and must be essential to the declared purpose of the corporation; not simply convenient, but indispensable. 1 Dillon, *Municipal Corporations* (4th ed.), sec. 89; *Anderson v. City of Wellington*, 40 Kan. 173. Powers encroaching upon the rights of the public or of individuals must be plainly and literally conferred by the charter. *Breninger v. Belvidere*, 44 N. J. Law, 350. The power to license must be plainly conferred, or it will not be held to exist. 1 Dillon, *Municipal Corporations* (4th ed.), sec. 361; *Dunham v. Trustees of Rochester*, 5 Cow. (N. Y.) 462; *Commonwealth v. Stodder*, 2 Cush.

(Mass.) 562; *Mays v. City of Cincinnati*, 1 Ohio St. 268; *City of St. Paul v. Traeger*, 25 Minn. 248.

It is conceded that no express power is given to license and regulate the vocation mentioned in the ordinance; but it is argued that the power is necessarily implied from the right of the city to designate the material and manner of construction of the walks to be laid in its streets. In considering this question, it should be borne in mind that the legislature in imposing upon the lot owner the burden of maintaining walks in front of his premises reserved to him the privilege of himself constructing the same. Section 121 of the charter of the city of Omaha (Comp. St. 1905, ch. 12a) provides: "Before any sidewalk shall be constructed or repaired by the city the owner or owners of the lots or lands to be assessed shall be given notice to construct or repair such sidewalk and shall have 20 days after the giving of such notice within which to construct or repair the same." And that "in case the owner or owners shall fail to construct or repair such sidewalk as directed the city may construct or repair said walk and assess the cost thereof upon the abutting property." It appears that, so far as the owner was concerned, he was acting within the right given by law to construct the walk in front of his premises, and the only question involved is the right of the city to compel the plaintiff to comply with the requirements of the ordinance as a condition of following his vocation. We think the restrictions imposed by the ordinance are not only unreasonably oppressive, but unnecessary to the exercise of the power to designate the material and manner of construction of such walks. Its provisions must prove onerous to the individual of slender means engaged in the vocation sought to be regulated. He is required to pay a fee of \$10 for each year or fraction of a year, a not inconsiderable tax upon a small business. In addition to this, he is required to give annually a bond, upon which his sureties will be liable for a period of five years, so that if he continues in business for that period of time he will be compelled to furnish five

distinct bonds, representing an aggregate liability of \$10,000, which is obviously impracticable, unless the applicant be of substantial means and established credit. While not creating a monopoly, the ordinance is monopolistic in its tendency, and would incline to lessen competition; and, for this reason, it should not be sustained, unless vitally necessary to the exercise by the city of the power to designate the material and manner of construction of its walks. No adequate reason why it is essential to the exercise of this power is pointed out in the argument of the defendant, and we have been unable to conceive one. The power of the city to prescribe the material and manner of construction of its walks may be enforced by its refusal to accept any walk not constructed according to its requirements. It was argued on the hearing that, if a walk were constructed by an unlicensed contractor, there might exist some latent defect which would cause its disintegration. Since the lot owner must rebuild and repair, this would be his loss, and not that of the city; and the power of the city cannot be sustained on the theory that it is necessary to protect the lot owner from the consequences of employing a dishonest or incompetent contractor. He has the stimulus of his own personal interest. He knows that he must rebuild or repair at his own cost if he allows inferior work to be done. This incentive always has been, and probably always will be, more effectual than the sense of duty as ordinarily developed in public officials. There is no alchemy in license fees and bonds to make a workman honest. Reliable work can only be secured by unremitting vigilance, and this vigilance will only be practiced by the individual whose financial interest is direct.

2. It was suggested that the power to enact this ordinance might be implied from the general welfare clause of the charter, or from the general power of supervision over streets. We are cited to no case which sustains the exercise of the power assumed, and in our own examination of the

authorities we have discovered no instance in which there has been an attempt to license or regulate the vocation in question. It was not contended in defendants' brief, nor upon the argument, that the ordinance was intended to require indemnity to the city against the liability it might incur for injuries to individuals caused by the negligence of the builder of such walks in the work of construction, and we do not determine the question whether the city has, under its general grant of power, authority to enact an ordinance requiring the owner of a lot, or a contractor engaged in constructing walks for owners, to give a reasonable indemnity against such injuries as a condition of the exercise of the privilege reserved to the owner by section 121, *supra*. It is not suggested that the construction of walks of artificial stone, asphalt or other composite material is attended by any danger to individuals that does not exist in the work of constructing walks of other material; and it is apparent that an ordinance to require indemnity against such risks should not be confined, as is the one under consideration, to persons engaged in the construction of artificial stone, asphalt or other composite walks.

The ordinance as it stands is without authority, unreasonable and void; and we recommend that the judgment of the district court be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JULES A. BLONDEL, APPELLEE, V. MARIE B. BOLANDER ET AL., APPELLANTS.

FILED JANUARY 8, 1908. No. 15,023.

1. **Specific Performance: FRAUD OF PLAINTIFF.** Where it appears that a plaintiff, who brings a suit in equity to enforce a specific performance of a contract, has obtained such contract by sharp and unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent, by trickery, or by any other unconscionable means, he will be denied affirmative relief.
2. ———: ———. Where a plaintiff, who, after having entered into a valid contract, has by means of sharp, unconscionable and fraudulent practices, and by a threat to repudiate the contract at a critical period during its execution, secured a change thereof greatly to his own advantage, brings a suit in equity for a specific performance of the contract as changed, he may not, after the court has determined the contract as so changed invalid for such misconduct, still prosecute such suit for the specific performance of the contract as originally made.
3. ———: **GROSS-PETITION: ACCOUNTING.** Where, in a suit to enforce a contract by a plaintiff who has obtained the same by means of sharp, unconscionable and fraudulent practices, the defendants claim as affirmative relief an accounting for rents received by the plaintiff, the maxim "he who seeks equity must do equity" may be applied, and there may be deducted from the amount otherwise due the defendants for such rents the amount of money expended by the plaintiff in their behalf and the reasonable value of his services performed for their benefit.
4. **Appeal: EVIDENCE: REVIEW.** In a case tried to a court without a jury, the admission of improper evidence is not in itself ground for reversal; and, where this court finds it unnecessary to consider the evidence to which objection is made, it will not review the question raised by the objection to such evidence.
5. ———: ———: ———. In order to predicate error upon the rejection of testimony, the party complaining of its exclusion must have made an offer of what he expected to prove, which would indicate to the trial court the relevancy of the testimony, and, in the absence of such offer, the action of the court in rejecting the testimony will not be reviewed.
6. **Pleading: AMENDMENT.** It is the duty of a trial court to permit an

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amendment to a pleading after the close of the testimony, when such amendment is in furtherance of justice and conforms to the proof, and the adverse party is not prejudiced by the delay in making the same.

APPEAL from the district court for Dakota county: GUY T. GRAVES, JUDGE. *Reversed with directions.*

William P. Warner and Milchrist & Scott, for appellants.

Edwin J. Stason and R. E. Evans, contra.

CALKINS, C.

John B. Arteaux died at Sioux City, Iowa, in the month of November, 1894, intestate, and possessed of considerable personal estate in Iowa, as well as two tracts of land situate in Dakota county, in this state, one of 160 acres, near Homer, and the other of 240 acres, near Jackson, sometimes called the "St. John land." The next of kin and heirs at law of Arteaux were his nephews Benoit Grezaud, Leon Grezaud, and Josef Beauvirronois, and his niece Francoise Jeandet, *née* Beauvirronois, all residing in the republic of France, and being of lawful age. The plaintiff, born in Switzerland, and familiar with the French language, resided in Sioux City. He was employed as an amanuensis by one Argo to write the heirs of Arteaux concerning their inheritance; and thereupon opened a correspondence with them on his own account, tendering them his services, and inviting them to his home, should they visit America. Benoit and Leon Grezaud thereafter came to this country, arriving in Sioux City in January, 1895. They went to the plaintiff's home, where they remained as his guests for several weeks, during which time the plaintiff and one Richardson were appointed administrators of Arteaux's estate in Iowa, and William P. Warner of Dakota City was appointed ancillary administrator of the estate in Nebraska. Shortly after the death of Arteaux, one Severson of Dakota county placed on record an instrument purporting to be a quitclaim deed for the

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240-acre tract, executed by the deceased during his lifetime to Severson. This deed was believed to be a forgery, and on the 17th day of January, 1895, Benoit and Leon Grezaud, on behalf of themselves and the other heirs, entered into a written agreement in the French language with the plaintiff, the material part of which appears from the translation in the record to be as follows: "Benoit and Leon Grezaud grant to J. A. Blondel the management and administration of the lands located in the state of Nebraska, under the following conditions: J. A. Blondel shall receive during two years, that is to say, until January 1, 1897, the income from these lands. He shall have to stand all taxes and keeping in repair which may be required by the farmer, and he pledges himself to make no new improvements without being authorized to that effect by the heirs. He pledges himself to sell it at a minimum price of \$20 an acre, and the one of 240 acres at an undetermined price. In any case, it is agreed upon that they will be sold at the highest possible prices, and that a sale cannot be granted without the written authorization of the brothers and sisters of Grezaud and Beauvirronois, whatever may be the prices which shall be offered. In the case where in the appointed time the lands cannot be sold, the present agreement shall become void and without effect, and the heirs of John Baptiste Arteaux would take back the possession of them and would dispose of them as would seem fit to them. As for the land of 240 acres, concerning which a question of ownership is raised, it is agreed upon that J. A. Blondel will take to his charge all of the expenses of court proceedings and of justice which can be occasioned in order to claim back the ownership of it and free it from all liabilities; J. A. Blondel would be entitled to half part of the price of the sale of this land, and, in case of failure, the heirs of J. B. Arteaux shall have positively nothing to pay. If J. A. Blondel has not done what is necessary in order to reclaim that ownership in the delay of two years, the heirs keep all their rights of this land, and reserve to themselves to make the best

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of them, when they wish and when they please. It is agreed upon in case of sale it will take place for cash; that the funds shall be deposited in a permanent bank of Sioux City; that the heirs shall be notified by this bank of the depositing of these funds before they send the titles signed by them, in order to definitely close the sale. In the case where Mr. Warner should have as administrator the income of said lands, the said J. A. Blondel pledges himself to forsake the incomes of these lands during the time of the administration of Mr. Warner."

About the 1st of February, 1905, the brothers Grezard returned to France, taking with them a formal power of attorney to the plaintiff, to be executed by all the heirs. This instrument, with some alterations, was afterwards executed by the heirs; but, it being conceded that its only office was to affirm and ratify the contract of January 17, it need not be further considered. Immediately after the departure of the brothers Grezard for France, the plaintiff retained Messrs. Lohr, Gardiner & Lohr, attorneys, to prosecute the suit against Severson and his grantees to quiet the title to the 240-acre tract; and later, and on about the 27th day of February, 1895, entered into a formal agreement with said firm to institute such suit in the circuit court of the United States for the district of Nebraska. They were to receive as compensation for their services, contingent upon the successful termination of the suit, an undivided one-sixth interest in the land, the plaintiff to advance and pay court costs, officers' and witnesses' fees, including the traveling and incidental expenses incurred by the said attorneys in prosecuting said cause. In the event of an appeal to the circuit court of appeals, the attorneys were to receive an undivided one-fifth interest; and, if the case were further carried to the supreme court of the United States, an undivided one-fourth interest in the land.

It seems that the plaintiff undertook to keep the Arteaux heirs advised of the progress of their affairs, and frequently wrote them after the return of Benoit and Leon

Grezaud to France. In the letters purporting to be written for that purpose the plaintiff represented the dangers and difficulties of the case as continuously increasing, until it finally became almost hopeless. In a letter written November 19, 1895, he threatened to abandon his undertaking, unless the heirs would relinquish to him all the rights they had in the 240-acre tract. To this Benoit Grezaud replied, consenting to execute a quitclaim deed to the property, abandoning the land to the plaintiff. The plaintiff forwarded to him a quitclaim deed for execution; but before the same was executed Leon Grezaud died; and shortly after his death, in the latter part of 1897 or early in 1898, Benoit died. The death of the two brothers and other circumstances delayed the signing of the quitclaim deed, and, the heirs becoming dissatisfied, it was never executed. The Severson case was tried in 1897, and a decree rendered in June of that year in favor of the Arteaux heirs, from which decree no appeal was taken.

In 1896 John J. Tracy and another set up a claim to the land in controversy, claiming to have the title by patent, and instituted a suit in the district court for Dakota county against the Arteaux heirs, making Severson and his grantees parties. The plaintiff, through his attorneys Messrs. Lohr, Gardiner & Lohr, defended this suit in the name of the heirs, was defeated in the lower court, appealed to the supreme court, and secured a judgment of reversal. During the year 1899 the Arteaux heirs sent Mr. Arthur Valois, an attorney having offices in Paris and New York, to investigate the affairs of the estate. Mr. Valois employed Mr. Milchrist, one of the attorneys for the defendants in this case, to look after the interests of the heirs and take charge of their property. Meanwhile it appears that Lohr, Gardiner & Lohr had brought an action to recover their compensation, and the surviving heirs settled with them, paying them \$1,300 attorneys' fees, and paying Mr. Warner \$100. They also settled the Tracy suit, paying them the sum of \$500 for the release of their claims.

After this the plaintiff brought this suit to enforce the specific performance of the agreement in the letter of Mr. Benoit Grezard of December 25, 1895, in which he consented to abandon to the plaintiff all the interest of the heirs in the 240-acre tract. The defendants claim that the contract in question was not ratified by the other heirs, was without consideration, and was obtained by fraud, deceit and concealment; that the plaintiff was not entitled to recover on the original contract of January 17, 1895, because he had not carried out the same; and that he had received a large amount of rents over and above that contemplated by the agreement, for which he should account. The district court found that the contract of January 17 had not been changed, and that, by reason of the manner in which the parties had treated the same, time was not of its essence, and that it remained in full force and effect; that the subsequent correspondence on the part of the plaintiff was deceitful and fraudulent, and that the subsequent contract was without consideration. The court held that the defendants were subrogated to a one-sixth interest in the land by reason of the payments to Lohr, Gardiner & Lohr; and that the plaintiff was entitled to an undivided two-sixths interest under the contract of January 17, incumbered, however, by the amount of money which the defendants had paid to Mr. Warner and the Tracys. In respect to the rents, the district court found the evidence insufficient to enable it to adjust the same, and taxed the costs equally to the plaintiff and defendants. From this judgment the defendants appeal, alleging error in the court's awarding the plaintiff any portion of the land, and in its refusal to charge the plaintiff with rents collected. The plaintiff files a cross-appeal, complaining of the finding of the court that the contract for the whole of the 240-acre tract was obtained by fraud and misrepresentation, and was without consideration; and from so much of the decree as charges the plaintiff with the amount paid to settle the Tracy litigation.

1. It is contended by the defendants that the promise

contained in the letter of Benoit Grezard of December 25, 1895, in which he acceded to the demand of the plaintiff that the heirs should abandon all their interest in the 240-acre tract, was without legal consideration, and procured by fraud, deceit and in the exercise of bad faith on the part of the plaintiff. It is one of the maxims of equity that he who comes into equity must come with clean hands. This maxim is much more efficient and restrictive in its operation than the maxim, he who seeks equity must do equity. It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him *all* recognition and relief with reference to the subject matter in question. "It says that whenever a party, who, as *actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." 1 Pomeroy, Equity Jurisprudence (3d ed.), sec. 397. This maxim is most frequently applied in suits like this, for a specific performance of contracts. A contract may be perfectly valid and binding at law; it may be of a class which brings it within the equitable jurisdiction, because the legal remedy is inadequate; but, if the plaintiff's conduct in obtaining it, or in acting under it, has been unconscientious, inequitable, or characterized by bad faith, relief should be denied him. *Lewis v. Holdrege*, 56 Neb. 379. "By virtue of this principle, a specific performance should always be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent, by trickery, or by any other means which are unconscientious." 1 Pomeroy, Equity Jurisprudence (3d ed.), sec. 400. See *Lewis v. Holdrege*, *supra*. We cannot escape the conviction that the plaintiff's conduct in obtaining this

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promise has been unconscientious, inequitable, and characterized by bad faith; that the agreement of December 25 was procured by sharp and unscrupulous practice, by overreaching, by concealment of important facts, and by taking undue advantage of his position.

The transaction between the parties must be considered in respect to their situation; that the defendants were citizens and residents of a foreign country, ignorant of our laws, language, manners and customs; that they had reposed confidence and trust in the plaintiff, and depended upon him to truly advise them of the condition of their affairs in this country; that he was their agent and owned to them a duty which is incumbent upon a person in a fiduciary relation. We do not lose sight of the contention by the plaintiff that he was not the agent of the defendants. Whether the contract of January 17, 1895, created that relation it is not necessary to determine. In the contract with his attorneys he assumed that such a relation existed, and he cannot, after such assumption, deny it to his own advantage. The plaintiff's letters of February 14, April 15, and June 18, 1895, indicate that he either was discouraged with the obstacles encountered in the litigation and had lost all confidence in the integrity of the courts and juries of Nebraska, or that he pretended such discouragement and loss of confidence, and was attempting to deceive the defendants into the belief that they could have little hope of securing justice in this country. On September 5, 1895, the plaintiff wrote to Mr. Benoit Grezard a letter, which appears from the translation in the record to be as follows: "Sioux City, Sept. 5, 1895. Mr. Benoit Grezard: The suit concerning the land of Jackson against Severson goes forward smoothly, and, although I have spent already about \$400 in the suit, I think this will be my loss. I can assure you of one thing, and that is that, if I had known all I now know, I should never have entered into this suit, for, even if we succeed in reclaiming the land, that will cost me as much as it is worth. Your uncle's title to this land is not good, for there are several

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mistakes, and Severson, who had seen it, knew that. It is also the reason why these people of Jackson used to say always that your uncle had no good title, and that this land did not belong to him. Your uncle had bought a tax certificate for \$13, and, as this certificate had never been refunded after three years, he had received a title which we call a 'title of tax sale,' and which in most part of the states is as good as any other. In Nebraska, however, these titles are not good for much, unless you occupy the land and cultivate it, a thing which your uncle has not done, and, what is more, the title of your uncle has been badly executed. If we should win the suit against Severson before having a good title, we shall still have one dozen other lawsuits on our hands with other people who claim each of them to be owners of some acres, and to whom I am certain we shall have to pay a certain amount for their claims. I went and saw the land, and I have found that on the corner is located the cemetery of Jackson, occupying about ten acres, and on the south side the Missouri has eaten away a corner, measuring about 20 acres, which leaves about 200 acres in all. From 80 to 100 acres are bottom lands and of good quality, but the remainder can be used only for pasture, and bad pasture, for the hills are too high and too steep. I do not like to allow Severson to have carte blanche, for, if I should give up the lawsuit now, he would prosecute me for malicious prosecution, and obtain judgment against me. I do not like either to spend much more money with so small a chance for return, for, at the best, my expenses will equal what I shall receive, and it will be a long time before we have a good title which will allow us to realize. Would you consent to take the suit into your hands and refund to me what I have already spent, if you should win? I even would be prepared to give you the profit of what I have already spent and allow you to continue the suit, rather than allow Severson to have carte blanche. As for me, however, it would be difficult to continue the action on the conditions we have made, for, at the best, I will have spent as much if

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not more than my half will be worth, and I shall have all of my time lost, as well as much anxiety and dangerous enemies to take care of. Thus, if I must take nine chances out of ten, not only to lose my time and money, but to make dangerous enemies (for Severson has already killed two men, and has also poisoned his brother-in-law in order to be able to defraud his own sister), and, at the best, if we succeed, to pay more than the full price for the part which will come to me, I prefer, as I told you above, before incurring larger expenses, to leave the whole matter with you now, giving you the benefit of what I have done up to today. When you were here, I had not seen the land, which I thought to be good, nor the title, which I thought to have been executed as it should have been. I was positive that Severson was a forger of the worst kind, a dangerous man, who should have been hung long ago, and I am still more positive now. That is why, thinking I would save you a loss of money, I offered to take the suit by half. I thought then I would be able to find lawyers who would take charge of it cheap, but it has been impossible for me to arrange in that manner, for every lawyer was expecting to make big fees out of the estate, and then I have begun by paying everything myself. Now I have spent about \$400, and have done but very little, for the court of the United States proceeds slowly in these lawsuits, which are numerous, and I see almost no possibility of recovering, or, even if we should win our suit, my expenses will be higher than my profits and all of my time and work will be for nothing. As my means do not allow me to work for justice's sake, I prefer to give up the affair now before incurring higher expenses, and, if you want to go forward with the suit, rather than see that scoundrel Severson keep the land unmolested, I will give you the profit of what I have done already, and, if you should win the suit, you will refund, and, if you lose, it will be my loss, and I will be the wiser another time. It will cost still, at least, from \$500 to \$800 before it is finished. This, as you see, with what I have already spent,

will amount to more than \$1,000. We are obliged to buy our evidence, without which we could do nothing. For instance, a notary who has made the deed of your uncle to Severson will give us his testimony if we pay him \$300, but, if not, he will give it in favor of Severson, and we will be lost, for he can say that he has never made that deed; as also he can tell that everything was in good order. The lawsuit is in Omaha, and we will be obliged to have all of our witnesses over there for a few days; to pay their transportation and return; to keep them in a hotel, and also to pay them \$3.50 a day for their time. As we have a score of witnesses that is going to cost dearly. Thus you see, dear Mr. Grezaud, the reason which prompts me to give up continuing the suit. If you take the suit to a good end, you will have a full interest. The expenses, I believe it honestly, will amount to \$1,500, and the land will not sell for more than \$2,000 with the title you will be able to give. In your next letter let me know what you are going to do, for if you go forward yourself it is necessary to take the testimony of the notary, who is waiting now in order to know what to do. You are going, without doubt, to find it strange that a notary can be bought, but Severson has foreseen that, and he used an unscrupulous notary for his transaction, and it is the one who will pay best who will get his testimony. Finally, enough on that subject, but let me know what you want to do."

In this letter the discouragements which the plaintiff had met in the prosecution of the suit to quiet title were grossly exaggerated. Some of the statements of fact—*e. g.*, the allegation that he had at that time spent \$400—are proved to have been absolutely false. It was well calculated to dishearten the defendants and make them believe the case much more hopeless than it actually was.

In reply to this letter, Benoit Grezaud on October 24, 1895, wrote a letter, of which the following translation appears in the record: "Pont de Vaux, Oct. 24, 1895. My dear Mr. Blondel: Regarding the farm at Jackson, it is

absolutely impossible for us to take that affair on our own account, as you propose to us. How do you expect that we, being strangers, not knowing the language of your country, might carry it to good end, if you, being there, acquainted with the laws of the country, cannot carry it through? We would prefer to abandon it entirely, rather than running the risk of a suit. It is for that reason that we had offered to give you one-half of the proceeds of that sale of the land, if you would revendicate the property at your own costs, perils, risks, refraining to undertake anything should you think of not being able to succeed, it is what you have accepted by the contract we made together. Inasmuch as the costs will be more considerable than you thought, and that even in case of success the half of the proceeds of this sale would not be sufficient to cover them, we will, if you think having any chances to win, and if consequently you are willing to go on with the suit, give you two-thirds, instead of one-half, but cannot do any better. If you have any doubts of success with prospective expenses as large as you say, perhaps it would be better to abandon the affair altogether, rather than exposing yourself more. We would deplore to see you obliged to pay those costs in pure loss and with much annoyance. We always thought that for you it would be a source of profits, and would not that it be otherwise."

The plaintiff's letter of September 25 had evidently produced the effect which might have been foreseen, and impressed the defendants with the belief that the difficulties were much greater than had been anticipated. The plaintiff was not, however, satisfied with their offer to increase his compensation to a two-thirds interest in the 240-acre tract. Their liberality only made him more rapacious; and on the 19th of November, 1895, he wrote them a letter, which appears from the translation in the record to be as follows:

"Sioux City, November 19, 1895. Monsieur Benoit Grezard: I understand your judgment regarding the Severson matter, and, although my great desire is to abandon

that affair now, to save you much annoyance and a certain loss of money, also to act loyally with you, must keep at the task, and to bad game show good heart, by paying the expenses, growing right along, up to the time of an answer from you to this letter. The suit, as you understand, although I am paying all the expenses, is brought in your name proper as heirs of the land in question. This was the only way to have a standing in court, for you alone have the rights of revendication. No one here knows that I am paying the expenses out of my own money, and every one wishes to make good fees. I have three law firms at Sioux City and two at Omaha interested in this suit, and up to this time have spared neither time nor money to carry to good end this suit, but the circumstances are difficult to overcome, for the law favors Severson, and we must furnish the proofs. Your uncle is now dead, and Severson has many rogues to help him by false testimonies. I would abandon the suit now, but Severson would immediately begin a civil suit against you for malicious prosecution, and it would be easy for him to recover a judgment against you for a few thousand dollars for damages to his reputation and the harm done him by this suit. As this suit would be at Dakota City it would be easy for him to arrange a jury who would be favorable to him, and would give a judgment for a few thousand dollars. So you will understand immediately why it is impossible to quit, even with a poor assurance to carry to good end this suit, and spending more money than it will bring if we win. My lawyers have notified me last week that your uncle's title to that property is so poor that, if we win this suit, the only thing left for us to do to strengthen our title is to take possession of the place and cultivate it for a period of ten years consecutively, after which time we would have what we call an adverse possession title; that is, if you stay on a piece of land having a poor title for ten years and cultivate it, you are recognized in law as the legitimate owner. Your uncle had possession of it for 18 years, but cultivated it in part

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only during the last five years. So, supposing that the land comes back to us, for the next ten years it will be impossible to sell it, for, the title not being good, no one would buy it, as cheap as it may be. With Severson for neighbor, it will be difficult to rent it advantageously, for the farmers are afraid of him and do not want to incur his enmity, being afraid that he may set fire to their home or poison their cattle. Besides this, there will be several other suits with individuals claiming small pieces having been bought while this land was a part of the village of St. John. So you see that what together we thought would be a matter of mutual profits will be, at the best, a source of loss, seeing that there will be other suits to begin, and that, even if I win the game, my money will be tied up in that bad deal for ten years, a thing not very profitable for a person who has but little of it. Then during that time one can die many times, and I would not let as complicated an affair to my wife. Here are then, everything considered, the conclusions to which I come: Either I continue the suit, to lose all, but saving you from the annoyance almost certain of a suit and a judgment against you by Severson for a good amount, or I'll abandon the affair now, saving myself an expense of at least \$1,000 with small assurance of success, and leaving Severson in peaceful enjoyment of the product of his theft (which he declares having paid cash and good money), and leave him the privilege to begin a suit against you as above mentioned. The choice is yours, but only under one condition will I follow my first proposition. If you wish me to continue, you will make me a contract by which you as heirs of John B. Arteaux relinquish in my favor all the rights that you have upon that piece of land if I carry to good end the lawsuit. Seeing the large amount of money which I must advance in this matter, the long period of time which I will have to wait before realizing, and the numerous annoyances which I will have and have had, added to the incertitude of return at all, it is only just to me that I should have such guaranty, or else that

I should quit before spending more money. My desire is to abandon the case, even if you accept my proposition, and I may assure you that, were it not for the fear of bad lawsuit to you, it would take me but a couple of minutes for a decision."

The mere reading of this letter, in the light of the facts already stated, shows that it was a gross exaggeration of the dangers and difficulties of the litigation. It was in some parts a misstatement of the facts, as where he states that he had employed three law firms in Sioux City and two in Omaha, and was endeavoring to create the impression that he had a large liability for attorneys' fees, when, in fact, his attorneys had undertaken the case upon a contingent fee, and he had no such number engaged. The statement that he was advised by his attorneys that the heirs would have to take possession and cultivate the land for ten years was untrue; and we cannot believe the plaintiff to have been under the apprehension of danger from a suit by Severson which he represents in this letter. When examined upon the stand in reference to this matter, he admitted that he only feared a suit from Severson in the event that the case was dropped or abandoned.

It was in response to this letter that Benoit Grezard on December 25, 1895, wrote the following: "Pont de Vaux, December 25, 1895. My dear Mr. Blondel: Regarding the affair, Severson, when we treated with you for the land of St. John, we thought that it would be for you a source of profit, and we had thought to understand that you would easily end that lawsuit to reclaim the title. It is for that reason that we had consented in case of success to give you half of the price of the sale of that land. If we had been able to suppose it was as long and difficult we would have immediately abandoned it to Severson, rather than make you run the chance of this lawsuit and to expose ourselves to the annoyance of which you speak to us. As we do not wish in any manner to intervene in

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this affair, we consent to abandon to you the totality of our rights upon that land as you ask it of us. If you think doing by continuing the suit, it is your business, for we will not enter in any cost whatever, neither directly nor indirectly. If you need an abandon (quitclaim deed) in due form, kindly make it and send it to us to sign, being careful to stipulate that you take to your own charge all the costs made, or to be made, and all the claim that Severson could make. You will inclose also a French translation."

This letter is the foundation of the plaintiff's claim, the contract of which he is asking a court of equity to require of the defendants the specific performance. Can it be said of the plaintiff that he stands in conscientious relations toward the defendants, and that his claim under this contract is fair and just? Here we find him, after having entered into a binding contract with the defendants, after having taken possession of their property, after having involved them in litigation, deliberately saying to them: "Give to me the entire subject matter of this litigation, or I will repudiate my contract, I will withdraw from and abandon your suit and your interests, though the consequences of my act will inevitably be the entire loss of the property and a judgment against you for damages." No contract so obtained can be enforced in a suit of equity; and the plaintiff should be denied the relief demanded upon the evidence of his letter of November 19, 1895, alone.

2. It is contended by the plaintiff that he is entitled to a one-half interest in the 240-acre tract under the contract of January 17, 1895, even if it should be held that the contract of December 25 was obtained by fraud or by such unconscientious means as would deprive him of a right to enforce a specific performance thereof in equity. We thus have presented the question whether a plaintiff, who, after having entered into a valid contract, has by means of sharp, unconscionable and fraudulent practices, and by a threat to repudiate the contract at a critical

period during its execution, secured a change thereof greatly to his own advantage, and brings a suit in equity for the specific performance of the contract as so changed, may, after the court has determined the change invalid, still prosecute his suit for the specific performance of the contract as originally made. The maxim that he who comes into a court of equity must come with clean hands means that such court will not enforce, on behalf of a plaintiff whose own conduct in connection with the same matter or transaction has been unconscientious, or unjust, or marked by want of good faith, or who has violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain, a contract so obtained. 1 Pomeroy, Equity Jurisprudence (3d ed.), sec. 398. It is to be observed that the conduct which will deprive the plaintiff of a right to resort to a court of equity for the relief to which he would otherwise be entitled must be in connection with the same matter or transaction. It is said that the maxim considered as a general rule controlling the administration of equitable relief is confined to misconduct in regard to or connected with the matter in litigation, and this is the only limitation of which we are aware. The misconduct of the plaintiff in this case is in connection with the relation of the parties under the contract originally entered into, and it therefore falls within the rule given for the application of the maxim. It is also, we believe, within its spirit. A court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, and it no less stringently demands the same from the litigant parties who come before it as parties or actors in such controversies. To allow a party, who fraudulently secures the alteration of a contract to his own advantage and brings a suit in equity to enforce it as altered, to proceed upon the original contract when the fraudulent character of his alteration is discovered, would be, it seems to us, to place a premium upon such

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conduct, and we are satisfied that it should not be permitted.

3. The defendants in their answer demand as affirmative relief an account of the rents received by the plaintiff for the land in question, as well as for the 160-acre tract near Homer. It appears that the plaintiff received rents of the former for the years 1896 to 1900, inclusive, amounting to \$1,078, and of the latter from 1895 to 1899, inclusive, amounting to \$1,225, a total of \$2,300, but the plaintiff expended of the moneys so received by him a considerable amount for the benefit of the defendants in carrying on the litigation, and in payment of expenses, taxes and repairs. To this part of the controversy the maxim that he who seeks equity must do equity may be applied, and we are of the opinion that the defendants should not be given this affirmative relief, unless they are willing as a condition thereof to credit the plaintiff with the expenditures he has made for their benefit. While this willingness is not expressed in the pleadings, the defendants in their brief consent to the plaintiff's being allowed for the expenditures he is shown to have made, and give a qualified consent that he be allowed a reasonable sum for his services. There is a sharp disagreement between the counsel for plaintiff and the defendants as to the amount of money received and paid out by the plaintiff, and we have been compelled to examine the record upon this question. While the evidence is not as clear and satisfactory as could be desired, we think that a finding that the amount paid by the plaintiff, added to the value of his services if he were to be compensated on a *quantum meruit*, would equal, but not exceed, the amount collected by him for rents would be fairly sustained by the evidence. We therefore conclude that, since the amount of the plaintiff's disbursements for, and the value of his services to, the defendants equal the amount of rents collected by him, the defendants are not entitled to recover anything on that account.

4. The plaintiff objected to certain interrogatories propounded to the defendants when their depositions were

taken, on the ground that they were not proper under the rule that cross-examination is limited to an inquiry into the facts and circumstances connected with the matters stated in the direct examination. It is well established in this state that, in a case tried to a court without a jury, the admission of improper evidence is not in itself ground for reversal. *Smith Premier Typewriter Co. v. Mayhew*, 65 Neb. 65. If there is sufficient competent evidence to support the finding of the trial judge, it will be presumed that he did not consider improper evidence found in the record. We have not found it necessary to consider the evidence objected to in making a disposition of the case, and it is not, therefore, required that we determine the question whether this evidence was properly admitted or not.

5. On the trial the plaintiff was interrogated while upon the witness stand as to conversations had with Benoit and Leon Grezaud. This testimony was objected to, on the ground that the questions called for a conversation between the plaintiff and a deceased person, of whom some of the defendants were personal representatives. This objection was sustained, and of this ruling the plaintiff complains. There was no offer by the plaintiff indicating what he expected to prove by the witness in response to the questions propounded and overruled, and we are unable to say whether the same were material or would have in any manner affected the case. It is well settled in this state that, to predicate error upon the rejection of testimony, the party complaining of its exclusion must make an offer of what he expects to prove which will indicate to the court whether the proposed testimony relates to relevant facts; and, in the absence of such offer, the action of the trial court will not be reviewed. *Barr v. City of Omaha*, 42 Neb. 341, and cases there cited.

6. The original answer charged the plaintiff with making the statements contained in the letters quoted in the first paragraph of this opinion; alleged that they were false and fraudulent, and made in bad faith; denied the

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making of the contract to give the plaintiff the whole, instead of the half, of the 240-acre tract. After the evidence was in, the defendants asked for and obtained leave to amend their answer so as to admit the writing of the letter of December 25, 1895, by Benoit Grezard, but alleging that he was induced to write such letter by the false and fraudulent statements of the plaintiff as charged in the original answer. Of the action of the court in allowing this amendment the plaintiff complains. Under section 144 of the code, it becomes the duty of the court in the furtherance of justice, and on such terms as may be proper, to amend any pleading by conforming the same to the facts proved. It is not suggested that the plaintiff was in any way prejudiced by the allowance of this amendment at this time; the case having been litigated between the parties in the same manner as if the answer had been the same at the beginning of the trial as it was after the allowing of the amendment. The answer as amended conforms to the proofs, and the amendment was made in the furtherance of justice.

We therefore recommend that the judgment appealed from be reversed and the cause remanded, with instructions to the district court to enter a judgment. (1) Dismissing the plaintiff's action, with costs, and quieting the title to the 240-acre tract in the defendants; (2) dismissing the defendants' counterclaim for rents.

FAWCETT and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment appealed from is reversed and the cause remanded to the district court, with instructions to dismiss the plaintiff's action, with costs, quieting the title to the 240-acre tract in the defendants, and dismissing the defendants' counterclaim for rents.

REVERSED.

CANADIAN FISH COMPANY, APPELLEE, V. WILLIAM H.
MC SHANE, APPELLANT.

FILED JANUARY 9, 1908. No. 15,048.

1. **Evidence examined**, and found sufficient to sustain the decision of the district court.
2. **Accord and Satisfaction.** Where a debtor remits by mail a sum less than the amount due, but which he in good faith believes to be all that is due or claimed by the creditor, the fact that he marks the check upon the margin "In full to date," or in the account which he renders describes it as "Check to balance in full," does not constitute it a payment made in settlement of a disputed claim, and the acceptance of such check by the creditor is not an accord and satisfaction.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

T. F. A. Williams, for appellant.

Tibbets & Anderson, contra.

CALKINS, C.

The plaintiff was a dealer in fish at Minneapolis, and the defendant a commission merchant in Lincoln. In February, 1902, the plaintiff's manager, being in Lincoln, made an oral agreement with defendant to handle frozen fish. It is agreed that the fish were to be invoiced at certain stipulated prices; but the defendant insists that they were to be consigned to him upon commission, he to have the difference between the invoice price and the amount for which he should sell the same. The plaintiff contends that the defendant agreed to purchase the same outright, and that it gave to him the privilege of returning any excess of stock he might have on hand at the close of the season. The plaintiff made two shipments of frozen fish, one February 18, and the other on March 3, of about 4,800 pounds, which amounted at the invoice price to the

sum of \$276.09. For some time prior to June 5 the plaintiff had been pressing the defendant for a remittance; and on the latter date the defendant wrote a letter in the words and figures following: "Lincoln, Neb. 6-5-02. Canadian Fish Co., Minneapolis, Minn. Gentlemen: Inclosed find my check for \$54.47 to cover consignment of fish from you of Feb. 18th and March 3d, as per account sales. This did not prove to be a good investment for either you or myself, as you will notice. I did not get near enough to pay for my freezer, which I had to build for this deal, to say nothing of the expense of handling the goods. In the first place you sent me too much fish the first time, so we could not possibly get rid of it before the fresh stock came on the market and killed the frozen fish trade. The second lot you sent was in bad shape when it arrived, as I told you once before, or we might have gotten rid of more of the trout. At the last, I consigned a good many shipments to get all I possibly could out of them, and in most all of the cases I was out the express charges both ways, as the parties would send them back. I am sorry to be compelled to send in any such report, but will simply state that I did the very best I could with the goods. Kindly acknowledge receipt of the check at once to cover and oblige. Yours truly, W. H. McShane." The account of sales which was inclosed in this letter showed the sale of about 1,084 pounds of fish, amounting to \$90.75, from which was deducted for commission and freight the sum of \$36.28, leaving a remainder of \$54.47. For the latter amount a check was inclosed, which was described as "Check to balance in full." The check was received by plaintiff's bookkeeper, credited to defendant's account, and plaintiff's manager on June 9 wrote, protesting that the fish had been sold outright, and refusing to admit the defendant's construction of the contract. The defendant not replying to this letter, the plaintiff brought this action in the county court, from which it was taken to the district court, where, a jury being waived, it was tried to the court, who found for the plaintiff gen-

erally. From a judgment rendered on this finding for the full amount claimed, the defendant appeals.

1. There was a sharp conflict between the testimony of the plaintiff's manager and the defendant, as to whether the goods shipped were sold to the defendant or consigned to him to be sold upon commission. In the letters of the plaintiff's manager there occur certain expressions which are claimed to corroborate the defendant's theory of the transaction. On the other hand, the defendant's letters in some respects are consistent with the contract as claimed by the plaintiff. But there is nothing in the correspondence which can fairly be said to settle this dispute. After a careful reading of the evidence, we cannot say that the evidence is not sufficient to sustain the findings of the court, and therefore we conclude that his finding upon the facts should not be disturbed.

2. The defendant claims that the acceptance by the plaintiff of the check for \$54.47, transmitted in his letter of June 5, was an accord and satisfaction. The check, as offered in evidence, contains the notation in the lower left hand corner: "In full to date." The bookkeeper who received the check testifies that these words were not upon the check when he received it; while the defendant testifies that they were written thereupon before forwarding the check. It is well settled that, where there is nothing more than simple payment and acceptance of a less sum of money in satisfaction of a greater sum due, this will not be sufficient to sustain a plea of accord and satisfaction. *McIntosh v. Johnson*, 51 Neb. 33; *Fitzgerald v. Fitzgerald & Mallory C. Co.*, 44 Neb. 463. To make the receipt of a part of the debt a discharge of the whole there must be a new consideration or a voluntary compromise of a disputable or disputed demand, by which each party yields something, or an accord and satisfaction by which a new contract is substituted. In this case there was no new consideration, and the contention of the defendant must be sustained, if at all, upon the theory that it was the compromise of a disputed claim. It is to be observed that there had been

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no actual dispute between the parties up to the time of the sending of defendant's letter above quoted. Assuming that the defendant was sincere in his contention, and we must so assume to make the claim a disputable one, and that he was actually mistaken in such claim, and this was found by the district judge upon sufficient evidence. as we have seen, we must conclude that he did not know of any dispute between the plaintiff and himself; but that he inclosed the check for \$54.47 in the letter of June 5, not as a compromise or settlement, but as full payment of an undisputed claim. The letter does not reveal any knowledge on the part of the defendant that the plaintiff was claiming the transaction to have been a sale. We have, therefore, presented the question whether, where a debtor remits by mail a sum less than the amount due, but which he in good faith believes to be all that is due or claimed by the creditor, the fact that he marks the check on the margin "In full to date," or in the account which he renders describes it as "che . . . to balance in full," such payment is made in settlement of a disputed claim. We think the question must be answered in the negative. No intention to offer this payment as a compromise is apparent from the letter and its accompanying inclosure, and the plaintiff was not bound to so consider it. He was justified in treating it as the act of an honest debtor remitting less than was due, under a mistake as to the nature of the contract. In *Treat v. Price*, 47 Neb. 875, it is said: "When money is offered on condition that it be accepted in full satisfaction of a demand, the person receiving it, if he receives it at all, must take it subject to the condition named. His acceptance of the money under such a tender is an acceptance of the condition, notwithstanding any protest that he may afterwards make to the contrary." And in *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334, it was held that, "where there is a *bona fide* dispute between parties as to the amount due upon an account, and the debtor tenders a less amount than the claim in full settlement, which the creditor accepts, with

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knowledge that it was tendered as a full settlement, the dispute will be a sufficient consideration to uphold the settlement, and will bar a recovery upon the remainder of the claim." It is urged by the defendant that these cases sustain the theory for which he is contending. There was no condition in the defendant's letter that the check, if accepted at all, must be accepted in full satisfaction of the plaintiff's demand; and there was no tender of it, as we have seen, in settlement of any dispute. The defendant does not, therefore, bring his case within the rule laid down in either of the above cases.

The judgment of the district court was right, and we recommend that it be affirmed.

FAWCETT and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

PETER RUFFING V. STATE OF NEBRASKA.

FILED JANUARY 9, 1908. No. 15,258.

1. **Cities: MISDEMEANORS: APPEAL.** Where a defendant is prosecuted before a justice of the peace by complaint and warrant for the violation of a village ordinance, and the acts charged are misdemeanors under the laws of the state, such defendant has no right of appeal under section 1006 of the code from a judgment finding him guilty.
2. ———: ———: ———. The right of appeal given by section 324 of the criminal code applies to cases prosecuted for the violation of village ordinances pursuant to the provisions of section 52, art. I, ch. 14, Comp. St. 1907.
3. **Indictment: AMENDMENT.** Pending an appeal under section 324 of the criminal code from a judgment of a magistrate, the district court may permit the filing of an amended complaint which does not essentially nor materially alter the original charge.

ERROR to the district court for Platte county: JAMES G. REEDER, JUDGE. *Affirmed.*

R. W. Hobart and William O'Brien, for plaintiff in error.

W. T. Thompson, Attorney General, Grant G. Martin, John J. Sullivan and Louis Lightner, contra.

CALKINS, C.

In May, 1906, one Muff, marshal of the village of Humphrey, filed a complaint before a justice of the peace residing in Platte county, and having jurisdiction to try and determine offenses against the ordinances of said village, charging that the plaintiff in error, hereafter denominated the defendant, "on the 3d day of May, 1906, in the village of Humphrey, county and state aforesaid, then and there being, did then and there get drunk and disorderly, and also abuse the said marshal on the public streets and in public places, in violation of ordinance number 72 of the said village of Humphrey, Nebraska, in such case made and provided, and against the peace and dignity of the people thereof." A warrant was issued upon this complaint, and the defendant being brought before the justice was tried and found guilty as charged in the complaint. Upon such conviction the justice imposed a fine of \$5, and incidentally \$10, as it appears, for contempt of court, together with the costs of the action. On the same day the defendant, with one Ternus as his surety, appeared before the justice and gave his recognizance in the sum of \$100, conditioned that the defendant should appear on the first day of the next term of the district court, and abide the judgment of the court. A transcript of these proceedings was filed in the district court, and on the 23d day of May, 1906, which appears to have been one of the days of the said next term, the said defendant having failed to appear, an order was made declaring his recognizance forfeited. On the 9th day of the following June the defendant filed a motion for an order setting aside the forfeiture of his recognizance. This motion was supported by affidavit, in which the defendant alleged

that he understood that said recognizance was entered into for the purpose of obtaining a change of venue from the justice before whom the complaint was made, and that he did not know the date of the first day of the said term of court, nor understand that he was required to appear, and in which he stated that he was ready and willing that the said cause should be brought on for trial before the said district court during the then present May, 1906, term, or at the next term of said court. On the 16th day of June this application was heard, and the court made an order setting aside and vacating the forfeiture of the defendant's recognizance. On the 23d day of November, 1906, the defendant moved to strike the transcript, complaint, warrant and recognizance from the files, because they were not properly certified, and ought not to have been filed, and for the reason that there was nothing to show that an appeal was pending in the case. There was nothing in the transcript to show that the defendant desired an appeal, nor that the recognizance was given for that purpose. But this motion was overruled, and the state was permitted to file an amended complaint, in the first count of which it was charged that the defendant on the 3d day of May, 1906, in the village of Humphrey, county and state aforesaid, then and there being, did then and there disturb the peace and good order of the said village of Humphrey, Nebraska, by being intoxicated on the streets and in public places within the limits of the said village to the annoyance of the citizens thereof, and contrary to the village ordinances in such cases made and provided. The second count charged the defendant at the time aforesaid with using profane, obscene, vile, insulting, offensive, indecent and disrespectful language toward and in the presence and hearing of Muff, a peace officer of said village, when and while the said peace officer was in the lawful discharge of his duties as such officer, contrary to the ordinance in such cases made and provided. This amended complaint was attacked on the ground that the offenses charged therein were different from those on

which the defendant was found guilty in the court below, which objection being overruled, the defendant was tried to a jury, and found guilty on both counts. The court, having overruled a motion for a new trial and in arrest of judgment, ordered that the defendant pay a fine of \$5 and costs of prosecution, omitting the \$10 assessed by the justice of the peace for contempt of court. From this judgment the defendant brings error.

1. Section 52, art. I, ch. 14, Comp. St. 1907, provides that "in counties not under township organization justices of the peace of any precinct in which any village or any part thereof may be situated, and in counties under township organization justices of the peace elected in said village, or from the township in which any village or any part thereof may be situated, shall have jurisdiction to hear, try and determine all offenses against the general ordinances of such village, and for that purpose may issue warrants for the arrest of any alleged offender, upon information under oath as in other cases; and upon the arrest of the defendant by the sheriff or any constable of the county, or marshal of such village, shall proceed thereon in all respects in the same manner and with the same powers as against persons charged with a misdemeanor under the general laws of the state; and the justice by or before whom such proceedings shall be had, and the officers making such arrest, shall be entitled to the same fees and costs, and be collected in the same manner as in cases of prosecution for misdemeanors under the laws of the state." No appeal is provided for by this statute, and the state in its brief concedes that none is expressly given, but urges that, where an act not criminal under the laws of the state is made unlawful by a municipal ordinance, a prosecution for a violation of such ordinance is in the nature of a civil action, and that therefore an appeal is given in such cases by section 1006 of the code, which provides for appeals to the district court from the judgments of justices of the peace in civil cases. In support of the contention that the proceeding is essentially a

civil one, the case of *Peterson v. State*, 79 Neb. 132, and a large number of cases from other states are cited. It may be conceded that, where an act is not criminal under the laws of the state, a municipal ordinance will not make it so, and that an action to recover a penalty prescribed by a municipal ordinance on account of an act not criminal by the general law of the state, but forbidden by such ordinance, is a civil action; but in this case the acts charged in each of the two counts of the amended complaint are offenses against the general law of the state. The first count in the complaint charges the defendant with being intoxicated on the streets and in public places of the village, while section 28, ch. 50, Comp. St. 1907, provides that if any person shall be found in a state of intoxication he shall be deemed guilty of a misdemeanor. The second count of the complaint charges that the defendant used profane, obscene, vile, insulting, etc., language toward and in the presence of the peace officer named. We think this offense is embraced in section 30 of the criminal code, which makes it unlawful for any person to resist or abuse any sheriff, constable or other officer in the execution of his office. We therefore conclude that the provisions of section 1006 of the code do not operate to give the defendant the right of appeal in this case.

2. Section 52, art. I, ch. 14, *supra*, after giving certain justices of the peace jurisdiction to hear, try and determine all offenses against the general ordinances of such village, prescribes the procedure. It is there directed that the prosecution shall be by complaint and warrant, and that upon the arrest of the defendant the justice shall proceed therein in all respects and in the same manner and with the same powers as against persons charged with a misdemeanor under the general laws of the state. Whether a prosecution for a violation of a municipal ordinance is in its essential character civil or criminal, this statute provides that it is to be conducted under the forms and in the manner of a criminal prosecution.

Chapter 29 of the criminal code is entitled "Trial of Minor Offenses before Magistrates," and regulates the proceedings of such officials in the exercise of their jurisdiction in all cases of misdemeanors in which the fine cannot exceed \$100 and the imprisonment cannot exceed three months. Section 324 provides that the defendant shall have the right of appeal from any judgment imposing fine or imprisonment to the district court of the county, which appeal shall be taken immediately upon the rendition of such judgment, and shall stay all further proceedings thereon. It provides that no appeal shall be granted or proceedings stayed, unless the appellant shall within 24 hours after the rendition of such judgment enter into a recognizance to the people of the state of Nebraska in a sum not less than \$100, and with sureties to be fixed and approved by the magistrate before whom such proceedings were had, conditioned for his appearance at the district court at the next term thereof to answer the complaint against him. The magistrate is required to make a return of the proceedings had before him, certifying the complaint and recognizance to the district court on or before the first day of the next term thereof. All of these proceedings are had before the magistrate and in the exercise of his jurisdiction. By section 52, art. I, ch. 14, Comp. St. 1907, the justice in this case was required to proceed against the defendant in the same manner and with the same powers as are provided by said chapter 29. A literal construction of the same would mean that the defendant in this case, upon the rendition of the judgment by the justice, might immediately take an appeal, and within 24 hours enter into a recognizance with sureties to be fixed and approved by the magistrate, and that the magistrate should, when he had approved such sureties, make a transcript of the proceedings and certify the same with the complaint and warrant to the district court on or before the first day of the next term thereof. In doing so, he would proceed in the same manner and with the same powers as against persons charged with a misdemeanor

under the general laws of the state. Sections 325 and 326 of the criminal code regulate the trial of such appeals in the district court; and, while not specifically included in the language of section 52, *supra*, they are so included by necessary implication, for it cannot be supposed that the legislature intended to authorize the steps essential to an appeal to be taken before the justice, without giving the district court power to hear the same. We are therefore of the opinion that all the provisions of chapter 29 of the criminal code are applicable to proceedings had pursuant to the provisions of section 52, art. I, ch. 14, Comp. St. 1907, and that the defendant had a right of appeal. No steps are required of him, except to give the recognizance prescribed, and this he seems to have done within the time and in the manner contemplated by this statute. This was followed by the filing of the transcript by the justice, and perfected his appeal to the district court.

3. The defendant contends that there was error in permitting the state to file an amended complaint in the district court. The complaint filed before the justice charged that the defendant got drunk and disorderly and abused the marshal on the public streets in violation of the village ordinance. The complaint as filed in the district court elaborated the charge made before the justice, but contained no new substantive matter. The first count charged the defendant with disturbing the peace of the village by being intoxicated in public places thereof, and the second count, with using profane and insulting language toward a peace officer of the village while in the discharge of his duties. The amended complaint is drawn with greater particularity, and charges the offenses more in detail, but does not essentially or materially alter the original charge.

We are therefore of the opinion that there is no error in the record, and recommend that the judgment of the district court be affirmed.

FAWCETT and AMES, CC., concur.

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By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

LOGAN LAMBERT V. STATE OF NEBRASKA.

FILED JANUARY 23, 1908. No. 15,055.

1. **Assault with Intent to Inflict Great Bodily Injury: QUESTION FOR JURY.** The term "great bodily injury," as used in section 17b of the criminal code, implies an injury of a graver and more serious character than an ordinary battery; and whether a particular case is within the meaning of the statute is generally a question of fact for the jury.
2. ———: **PRESUMPTIONS.** No wrong, however serious to the person of another, will alone warrant a conviction for an assault with intent to inflict great bodily injury; but, when the injury proved is a natural and necessary consequence of the deliberate and inexcusable act of the accused, the presumption is that it was the result contemplated by him in the commission of the assault.
3. ———: **INTENT: EVIDENCE.** It is not essential to a conviction for such offense that the accused should have intended the precise injury which followed. It is sufficient if it be shown, beyond a reasonable doubt, by the circumstances under which it was inflicted, together with its nature and extent, that great bodily injury was contemplated by the defendant when he made the assault.
4. ———: **INSTRUCTIONS.** In a case where there is competent evidence tending to show that the defendant in making the assault was actuated by motives of hatred, ill will or revenge, it is proper for the court to charge the jury that: "If you should find and believe from all of the evidence, beyond a reasonable doubt, that the defendant assaulted the prosecuting witness, at a time when he had no reasonable apprehension of immediate and impending injury to himself, and to accomplish some unlawful purpose, or from a spirit of retaliation or revenge, then he cannot avail himself of the law of self-defense."

ERROR to the district court for Dakota county: GUY T. GRAVES, JUDGE. *Affirmed.*

T. L. Sloan, E. R. Berins and Sullivan & Griffin, for plaintiff in error.

W. T. Thompson, Attorney General, and Grant G. Martin, contra.

BARNES, C. J.

Logan Lambert, defendant in the court below, was convicted of the crime of assault with intent to commit great bodily injury upon one Joseph Schell, and from a judgment of the district court for Dakota county sentencing him to imprisonment in the penitentiary for the term of one year he has prosecuted error to this court.

Defendant's first contention is that the verdict and judgment are not sustained by the evidence; and the rule that the words "great bodily injury" imply an injury of a graver and more serious character than an ordinary battery is invoked by him in support of his contention. It appears that the prosecuting witness was a Roman Catholic priest, who had charge, under the authority of the bishop of his diocese, of the Indians at the Winnebago reservation in Thurston county, and was living on the reservation at the time the assault in question was committed; that on the 13th day of April, 1905, the prosecuting witness, who for convenience will be hereafter called the priest, went to Dakota City, Nebraska, in company with an Indian, to attend a trial before the county judge of Dakota county, wherein one Ed Luikhart was being prosecuted for having assaulted an Indian of the name of St. Cyr. Luikhart was a brother-in-law of the defendant. The priest attended the trial, but was not a witness. After the trial was over, and about the hour of 2 o'clock in the afternoon, he went to Easton's livery barn, where he had left his team, and requested the man in charge to hitch it up for him. While waiting, he walked leisurely back and forth in front of the buggies in the barn. Owing to the inclemency of the weather, he had on a heavy fur overcoat and cap. While he was thus waiting, the defend-

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ant came into the barn, walked back to where the priest was, and said: "Father Schell, could I see you for a moment privately?" The priest said: "Certainly." The defendant suggested that they step back, and they walked back to the second stall on the north side of the barn, and stepped into that stall. The defendant then asked the priest: "What do you think I should do about that trouble I am in, in Omaha?" While the priest was looking down, thinking what he should say in answer to the question, he was struck by the defendant, and knocked down. When he tried to raise his head, he saw the defendant had something in his hand two or three inches long. At this instant he felt a kick in the face, and became unconscious. When he regained his consciousness, he found that his face was bleeding copiously, and his jaw was broken in three places. He was assisted to a private house, and was then taken to a hospital in Sioux City, where he was treated for several weeks. At the time of the trial he had not recovered from his injury; his face being paralyzed on one side from his jaw to his chin.

It is disclosed by the record that the priest had been looking after the welfare of the Indians, and had been active in trying to prevent the unlawful sale of intoxicating liquors to them. The defendant and several of his associates had been engaged in such unlawful sales, commonly called "bootlegging," and the priest had therefore incurred their bitter enmity. According to the testimony, the defendant was an exsaloon-keeper, and had served a short term in the federal penitentiary at Sioux Falls, South Dakota, for introducing intoxicating liquors on the reservation, and the priest had been somewhat active in assisting the prosecution of such offenses. It appears that the defendant assaulted him without warning; that while he was in an attitude of listening to an inquiry he was knocked down, and rendered unconscious, and while in the act of trying to rise from the ground the defendant kicked him in the face. This clearly shows a disposition on the part of the defendant to inflict on his

victim more than an ordinary battery. In any event, the injury inflicted was a very severe one. The priest's jaw was broken in three places, and as a result thereof he was confined to a hospital for several weeks. It also appears that the injury was of a permanent character; that one side of his face, from the jaw to the chin, was paralyzed. This, in connection with the fact that the defendant's brother-in-law had just been charged with assaulting an Indian, that the priest was attending the trial looking after the interest of his charge, that he had been active in bringing the defendant and others who were introducing intoxicating liquors upon the reservation, to justice, shows the motive which prompted the vicious and carefully planned assault. Evidently the jury took the view that the assault was made for the purpose of chastising the priest for the real or imaginary grievance which the defendant and his friends had against him, and with the intention of inflicting upon him great bodily injury. The evidence of the state as to the nature and manner of the assault, if believed by the jury, and the extent of the injury inflicted thereby, was amply sufficient to show an intent on the part of the defendant to inflict great bodily injury upon his victim. The facts of this case are very similar to those in *Murphey v. State*, 43 Neb. 34, where a verdict finding the defendant guilty of assault with intent to inflict great bodily injury was sustained. There the victim of the assault was an aged man, who was knocked down and kicked by the defendant, and the resulting injury was a broken leg; while in the case at bar the victim of the unlawful assault was a nonresistant, a minister of the gospel, whose mission was to teach the doctrine of "peace on earth, good will to men," and whose only fault seems to have been his zeal in trying to prevent the defendant and others from debauching the Indians, whose temporal and spiritual welfare had been committed to his charge. In *Murphey v. State*, *supra*, it was said: "But, where the injury proved is the natural and necessary consequence of the deliberate and inexcusable act of the ac-

cused, the inference is that it was the result contemplated by him when the assault was committed, and may be sufficient evidence of the specific intent which is essential to a conviction." That the defendant intended to inflict great bodily injury upon the priest may reasonably be inferred from the facts of this case, and the jury were warranted in finding the defendant guilty of the crime charged against him.

Defendant's second contention is that the court erred in giving paragraph 15 of his instructions. It is said that this instruction has been twice condemned by this court. By it the jury were told, in substance, that, if they should find and believe from all of the evidence, beyond a reasonable doubt, that the defendant assaulted Joseph Schell, at a time when he had no reasonable apprehension of immediate and impending injury to himself, and to accomplish some unlawful purpose, or from a spirit of retaliation or revenge, then the defendant could not avail himself of the law of self-defense. We conclude, from an examination of the record, that this instruction was given because the defendant had testified that, when he knocked the priest down, he thought that he was about to be assaulted by him, and believed that it was necessary for him to strike in self-defense. It is true we condemned a like instruction in *Blair v. State*, 72 Neb. 368; not because the instruction was incorrect as a proposition of law, but because there was no evidence in that case upon which to predicate it. In the case at bar, however, it sufficiently appears from the evidence contained in the record that the defendant might have been actuated in his assault upon the priest by hatred, ill will or revenge, and therefore sought the opportunity presented at that time to gratify his feelings by inflicting upon him great bodily injury. So we conclude that the giving of the instruction complained of was proper, in this case, and the judgment of the trial court should not be reversed therefor.

Having thus disposed of the only contentions presented for our consideration by the brief and argument of the

defendant, it follows that the judgment of the district court should be, and is,

AFFIRMED.

SEARLE & CHAPIN LUMBER COMPANY, APPELLANT, v. M. F. JONES ET AL., APPELLEES.

FILED JANUARY 23, 1908. No. 15,056.

1. **Mechanics' Liens: EVIDENCE.** The verified account filed for the purpose of securing a mechanic's lien for material furnished in the erection of a building is no evidence of the delivery of the material or the state of delivery.
2. **Evidence examined, and held** insufficient to show the delivery to defendants of certain material.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Flansburg & Williams, for appellant.

Hall, Woods & Pound, contra.

DUFFIE, C.

In 1903 M. F. Jones entered into a contract with J. A. Watson to erect for her a dwelling house on lot 8, in block 9, Capitol addition to the city of Lincoln. The plaintiff, the Searle & Chapin Lumber Company, is engaged in the retail lumber business, and furnished Watson the material used in the construction of the Jones dwelling. The last item charged in the account was on September 14, 1903, and consisted of 16 pieces of quarter-sawed oak flooring. The item preceding this last charged was made on September 2, 1903, and plaintiff's claim for a lien was filed November 12 of that year. Suit was brought to foreclose the lien, and the defense made was that the claim for a lien had not been filed within 60 days from furnishing the last material. The defendants assert that the flooring charged under date of September 14 was not delivered.

The district court dismissed the plaintiff's petition, and it has appealed, asking a reversal of the judgment.

One D. E. Green was manager of the plaintiff's yards at the city of Lincoln. He testified that 16 pieces of flooring were sent to the lot upon which the building was being erected, on September 14, 1903, on the order of Watson, the contractor. The driver was furnished with two tickets containing the items to be delivered. One of these he presented to the contractor or other person in charge of the work, who receipted the same, and the driver returned this receipted ticket to the office of the company, where the ticket was used in charging the material described therein to the party to whom delivery was made. C. I. Jones, husband of M. F. Jones, was present at the building when the driver arrived with the flooring. He testified that he is the husband of M. F. Jones, the owner of the premises on which the house was built; that J. A. Watson was the contractor for the building of the house; that he was at the house at the time the lumber was sent out on the 14th; that no part of it was taken from the wagon; that he signed the receipt "exhibit 2"; that the driver came into the building with a ticket, while the wagon stood on the opposite side of the street; that some pieces of lumber were taken from the house and piled on the wagon, and the whole load was then returned to appellant's yard; that the lumber sent out that day was rejected because it was not kiln-dried; that no flooring was used in the house that was not kiln-dried at the N street mill; that this lumber came from the yard, and was not kiln-dried, and Watson told the driver to take it back; that just previous to this he had a conversation with Watson in regard to using the kiln-dried lumber in the dining room, and the lumber on the wagon was not kiln-dried, and for that reason was sent back; that he knows positively of his own knowledge that none of the lumber sent out on the 14th was delivered at the house or on the premises, or even unloaded from the wagon. Jones further testifies that the driver left his team in the street, and

brought the ticket into the house and he signed it, but he could not say whether Watson instructed him to sign it; that not taking up the receipt he had signed was an oversight; that he knows the lumber was hauled away, together with some other material taken from under the porch of the house and loaded on the wagon; that he saw the lumber taken away. Green, the manager, only knows that the flooring was taken from the yard by the driver for delivery at the Jones place, and that the driver returned the receipted ticket, from which the charge was made, but he does not pretend to have any personal knowledge of the delivery of the lumber. In this condition of the case, we think the court was right in accepting the positive evidence of one who was present and knew the facts. So far as appears from the record, the only persons who had personal knowledge of the disposition made of the flooring were Mr. Jones and the driver of the wagon. The latter was not used as a witness, and Jones' evidence is contradicted only by the fact that he allowed his receipt for the flooring to be returned to the office of the lumber company by the driver. That the bookkeeper should charge this item to Watson on the return of the receipt is natural, and a strong presumption in favor of the delivery of the lumber arises from the return of the receipt; but we do not think that it can prevail over the direct and positive evidence of Jones. The charge entered in the books of the company is no proof that the flooring was delivered. If these 16 pieces had been delivered and accepted by the contractor, or other party in charge at the building, the date for filing a lien would date from such delivery, but if no delivery was made, if, as seems most probable from the evidence, the flooring was not accepted, but was returned, then it is evident that there could have been no delivery, and the time for filing a lien would date from the last charge preceding this, which was more than 60 days prior to the filing of the lien.

We recommend an affirmance of the judgment of the district court.

EPPELSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

IONE AMBLER, APPELLANT, v. D. C. PATTERSON, TRUSTEE,
APPELLEE.*

FILED JANUARY 23, 1908. No. 15,236.

1. **Tax Deed:** SETTING ASIDE. After confirmation of a sale for delinquent taxes made under the so-called scavenger act, the deed issued to the purchaser will not be set aside on account of irregularity in the levy of the tax, or because an item of void special tax was included in the sale.
2. **Taxation:** NOTICE TO REDEEM. A fair construction of the statute requires that a separate notice to redeem from a tax sale should, when published, be given to the owner of the land sold.
3. ———: ———. A notice running to several different persons, and describing different tracts in which each had a separate interest or ownership, is not sufficient.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Reversed.*

W. A. Saunders, for appellant.

H. P. Leavitt, contra.

W. H. Herdman and *Charles Battelle*, amici curiæ.

DUFFIE, C.

The plaintiff brought this action to quiet her title to lot 9, in block 16, in Ambler Place, an addition to the city of Omaha. She alleges that the defendant is in possession thereof, claiming title to the same under a tax deed issued by the treasurer of Douglas county under what is known as the "Scavenger Tax Law." The district court sustained

* Rehearing denied. See opinion, p. 575, *post*.

a demurrer interposed to the petition, and dismissed the action, and the record has been brought here on appeal.

It is alleged in the petition that on July 1, 1904, a petition was filed in the office of the clerk of the district court for Douglas county, Nebraska, in the form prescribed by chapter 77, art. IX, Comp. St. 1903; that notice thereof was published as provided by section 7 of said act; that in the petition and notice plaintiff's property was described and taxes to the amount of \$47.09 claimed as due thereon; that of these taxes \$8.69 was for regular city taxes for the years 1894 to 1897, both inclusive; that \$2.52 of said taxes was for repairing a sidewalk adjacent to the property. It is further alleged that the sidewalk tax is void for non-compliance with certain provisions of the charter of the city in assessing and levying the same. It is shown that a default decree was entered against the lot in September, 1904, the lot being described as tract No. 2,835, and that subsequently to the entry of said default decree "a notice of sale was published as provided in said act"; that on January 27, 1905, a sale of the lot was made to defendant herein and a certificate duly issued to him. Further it is alleged "that subsequently, on the 3d day of October, 1906, a certain affidavit for publication of final notice was filed in said tax suit, a copy of which is hereto attached marked 'Exhibit 5' and made a part hereof, and thereafter a certain notice, designated as 'Final Notice,' was published in the Omaha Bee, a copy of which, together with proof of publication, was filed in such suit on January 25, 1907, is hereto attached, marked 'Exhibit 6,' and made a part hereof"; that thereafter notice of confirmation was entered in the confirmation record, and an order of confirmation made on February 16, 1907. It is further shown that during all of these proceedings the plaintiff was a non-resident of and absent from the state of Nebraska, and had no actual or personal knowledge of the proceedings. It is also alleged that prior to commencing the action plaintiff had tendered to the defendant the full amount by him paid at tax sale and all subsequent taxes by him

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paid upon the lot, together with interest and costs, and that she had tendered to the treasurer of the county the full amount of the county and city taxes charged against said real estate, after crediting the amount paid by the defendant at the time of the sale.

The objection made to the sidewalk tax is that no notice of any kind to construct or repair the sidewalk was ever served upon the plaintiff, who at that time had a known residence in the city; that in respect to the regular taxes of the city, which were delinquent upon the lot when the sale was made, the city council failed to hold a session of not less than five days as a board of equalization to equalize the taxes of said year, and failed to give notice of any sitting or session of the council for said purpose. After confirmation of the sale made under the provisions of the scavenger tax law, no irregularity in the assessment or levy of the tax will operate to avoid the sale. Ample opportunity is offered the owner of real estate to contest the validity of the tax prior to the issuance of the deed. The statute is a public one, and of itself is notice to the taxpayer that any and all objections to the tax assessed against his property must be presented to the court before confirmation of the sale is had. After confirmation the purchaser takes absolute title to the land purchased, and the taxpayer has no remedy to recover his estate, unless he can impeach the proceedings on grounds upon which equity would base relief against a judgment in other cases.

In an *amicus curiæ* brief filed by W. H. Herdman, it is insisted that the notice of sale set out in the petition is insufficient, for the reason that it was not published three consecutive weeks in October, 1904. Section 17 of the act provides for the notice of sale in the following words: "It shall be the duty of the county treasurer of each county in the month of October of each year to cause a notice to be published once a week for three consecutive weeks, in some newspaper published and of general circulation in the county," etc. Comp. St. 1903, ch. 77, art. IX. The

proof of publication found in exhibit 3, attached to the petition, shows that the notice of the sale was published on October 11, 18, and 25, 1904, and it is insisted that the last week of the publication would end November 1, and that the completed publication was not made in the month of October. To us this objection appears extremely technical, and we are satisfied that three successive publications made in a weekly newspaper, each issue of which was published during the month of October, meets the requirements of the statute.

Again, it is insisted that the final notice of redemption is insufficient. Section 33 of the act provides for personal service of notice to redeem upon the resident owners and upon parties in possession of the real estate sold. Section 34 makes provision for such notice to be given to non-resident owners by publication. The notice in this case is headed "Tracts No. 2,820, 2,821, 2,831, 2,835," and is directed to "Fannie Edna Osborn, Ione Ambler, Louisa P. Ambler, owners, and to unknown owners, and to the occupants, of the real estate described below." The real estate described in the notice is lots 1 and 2, in block 15, and lots 1 and 9, in block 16, in Ambler Place. The record does not show, nor is it claimed, that the plaintiff herein was the owner of more than one of these lots, and the question is whether a notice which may be called a "blanket notice," directed to several parties owning several distinct and separate tracts of land, is such a notice as is contemplated by the statute.

The scavenger act provides for the enforcement and collection of delinquent taxes by an action in court. The treasurer is to file a petition embracing a description of all lands delinquent for taxes, each tract to be numbered. While all tracts that are delinquent are embraced in the same petition, the statute makes the action a separate suit against each tract and its owner. Section 6 of the act provides: "The filing of such petition shall operate as the commencement of a separate (several) action against each parcel of real estate shown in the petition,

as well as against every party having or claiming any interest, right, title or claim in, or to, such real estate or any part thereof." Section 14 of the act, among other things, provides: "The court may, on its own motion, or on motion of either party, consolidate all cases and defenses in which the answers present identical issues, provided, cases shall not be consolidated where objection is made by either party." There can be no doubt that we must regard the proceeding as a separate action against each tract of land and against each owner, and that all proceedings had relating to any particular tract, or the owner of such tract, must be regarded as an independent and separate action brought against that tract and the owner thereof. It is true that the purchaser of more than one tract may have the several tracts bid in by him embraced in one certificate of sale, and in one deed when confirmation of the sale is made, but this may be done only because the statute makes special provision therefor. In no other respect can duality of proceeding occur.

An Iowa statute provides for giving notice to the owner of real estate sold for taxes by the holder of the certificate. The effect of embracing several different tracts owned by different parties in one published notice was before the supreme court of that state in *White v. Smith*, 68 Ia. 313, 25 N. W. 115, and it was there said: "The statute provides that the notice shall be given by the 'lawful holder of the certificate of purchase.' It evidently contemplates that a notice shall be given by the holder of each certificate of purchase. A fair construction of the statute requires that a separate notice should be given to the person in possession of or to whom each tract of land was taxed. It is required, we think, that the holder of each certificate of purchase must give a notice which describes only the land therein referred to and states the other statutory requisites. The notice in this case may be well designated as a 'blanket notice,' and such a notice is unknown to the law. A person is not and should not be required to look over fifteen or more descriptions of land to see if any is

described in which he is interested, nor should he be required to look over as many names in a published notice to see whether such notice is directed to him. The notice is insufficient; and, as both deeds are based on the same notice, the right to redeem exists unless no notice was required to be given, which counsel for defendant contend in the case." We fully concur in this reasoning, and believe that each owner is entitled to a separate notice directed to him alone, describing his own land only, and that what the Iowa court terms a "blanket notice" is not sufficient.

Other objections raised in this brief need not be considered, as the petition recites that the matters objected to were done and performed as required by the provisions of the act, and no fact to the contrary is alleged or shown.

Because of the insufficiency of the final notice of redemption, we recommend a reversal of the judgment appealed from.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment appealed from is

REVERSED.

The following opinion on motion for rehearing was filed October 8, 1908. *Rehearing denied:*

DUFFIE, C.

A motion for rehearing, supported by a brief of unusual merit, induced us to order a reargument of the case, and to reexamine the opinion herein, *ante*, p. 570.

The objection urged against the opinion is our holding that a notice running to several different persons and describing different tracts, in which each had a separate interest or ownership, is not sufficient to comply with the statute relating to "final notice" before confirmation of the sale is had. A thorough examination of what is known

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as the "Scavenger Act" (Comp. St. 1903, ch. 77, art. IX) convinces us that it was the intention of the legislature to allow the owner of land, against which a decree of sale for delinquent taxes has been entered, every opportunity to save his land, either by paying the amount of the decree prior to a sale, or by redeeming from the sale afterwards made. That the act should receive a liberal construction in favor of the owner to comply with this evident purpose of the legislature should not be denied; and it is our duty to afford the owner the opportunity to redeem his land where full and actual compliance with the statute has not been observed. The language of section 33 of the act, providing for service of a "final notice," is, to our minds, quite conclusive that a separate notice relating only to his own lands should be served on each owner and occupant thereof. It is true that the statute allows a purchaser to have any number of tracts purchased by him embraced in the same certificate, but it would be absurd to hold that the sheriff, in preparing the final notice which he is required to serve upon the owners and occupants of land, should embrace in such notice a hundred or more of such owners, and a like number of tracts belonging to different owners, if the certificate of sale contains that number. While we inadvertently misquoted the language of section 6 of the act, using the word "separate" instead of the word "several" in our former opinion, we cannot escape the conclusion that, while the legislature provided for embracing in one petition all lands upon which taxes were unpaid, it was the intention to deal with the several tracts and the several owners thereof as though a separate action had been filed against each. The language of section 6 implies that this is so: "The filing of such petition shall operate as the commencement of a several action against each parcel of real estate shown in the petition, as well as against every party having or claiming any interest, right, title or claim in, or to, such real estate or any part thereof." If a separate suit had been commenced against each tract and the owner thereof, it would hardly be con-

tended that numerous tracts and numerous owners could be embraced in the same final notice, and it would be unfair to the owner of the land, especially where the notice is given by publication, to require him to examine a list of numerous names to see if his own appears therein, or numerous descriptions of real estate to ascertain whether any of his own lands were among the descriptions. The purpose of the statute was to bring home to the owner by direct notice the fact that his land had been sold and that a last opportunity to redeem was now offered him. Further consideration and reflection has convinced us that our former holding is right, and should be adhered to. Of course, different tracts belonging to the same owner may be included in one notice, as this could have no tendency to mislead him. A rehearing is

DENIED.

FIRST NATIONAL BANK OF PLATTSBURGH, APPELLEE, v.
ALBERT B. GIBSON ET AL., EXECUTORS, APPELLANTS.*

FILED JANUARY 23, 1908. No. 15,145.

1. **Exceptions, Bill of:** MOTION TO QUASH. A bill of exceptions will not be quashed upon the motion of an appellee, to whom it had been properly submitted, because it was not served upon another party to the action.
2. **Fraudulent Conveyances.** The former adjudications of the question here involved examined, and *held* decisive of this case.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

S. L. Geisthardt, for appellants.

A. N. Sullivan, *contra*.

EPPERSON, C.

The subject matter of this litigation has been before the courts of this state since 1889. The former opinions con-

* Rehearing allowed. See opinion, p. 580, *post*.

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tain a statement of the facts. See 57 Neb. 246; 60 Neb. 767; 69 Neb. 21; 74 Neb. 232, 236. On the last appeal (74 Neb. 236) the judgment was reversed and the cause remanded. Trial was had, and the First National Bank of Plattsmouth (appellee) was awarded the sum of \$2,328.60 against the representatives of Francis N. Gibson, deceased, to pay the bank's judgment against John M. Carter out of the rents and profits of certain lands in Cass county claimed and formerly adjudged to have been fraudulently conveyed to Benjamin A. Gibson, and by the latter to Francis N. Gibson, now deceased.

Appellee filed a motion to quash the bill of exceptions because it was not served upon the administrator of Carter's estate. The administrator was a party to the suit, having been substituted upon Carter's decease. It was decided in *First Nat. Bank v. Gibson*, 69 Neb. 21, that Carter was a necessary party to this action in the court below. It does not necessarily follow that a submission of the bill of exceptions to the administrator is prerequisite to a consideration thereof upon the issues existing between the plaintiff and Gibson. In *Crane Bros. Mfg. Co. v. Keck*, 35 Neb. 683, it was held: "Where there are two or more principal defendants against whom the plaintiff is seeking to enforce a claim, there being no particular controversy between them, service of the bill of exceptions upon one of such defendants or his attorney within the time fixed by statute will be sufficient." We think the same rule should apply in this case, where there was in fact no controversy between the appellant and his codefendants, Carter and the administrator. A failure of the appellant to serve the bill of exceptions upon all of the appellees was held in *Fitzgerald v. Brandt*, 36 Neb. 683, not to be such a submission as was required by section 311 of the code. But it will be observed that the bill of exceptions was quashed only as to the appellees to whom it was not submitted. In this case the exceptions were submitted to the appellee, and his motion to quash must be overruled.

REVERSED.

Appellants' sole contention is that the bank's right in the present suit to have the rents and profits applied to the satisfaction of its claim could have been determined in the action to set aside the fraudulent conveyance (57 Neb. 246; 60 Neb. 767), and, hence, the judgment in that case is a bar to the relief now sought. This identical question was an issue in this court when this case was here before. As reported in 74 Neb. 232, the conclusions first announced were favorable to defendants' (appellants') present contention. Upon rehearing, the former judgment was vacated (74 Neb. 236), and the conclusion announced there, we consider, resolved this question adversely to appellants. It is there said: "When a conveyance of real estate is set aside as fraudulent at the suit of a creditor, and the land subjected to the lien of his judgment, and is insufficient to pay the judgment, such fraudulent grantee may, in proper proceedings, be compelled to apply upon the judgments the rents and profits of the land which accrued while the land was in his possession under the fraudulent conveyance." And in the opinion we find the following: "If the judgment debtor had transferred current funds to the defendant for the purpose of defrauding his creditors, the creditors, upon making this appear, might in equity recover the amount from the defendant; and so, if, to defraud his creditors, he placed in the hands of the defendant that which would produce value, intending that the proceeds should be placed beyond the reach of his creditors, such proceeds could in equity be reached by the creditors." This court refused to apply to this case the rule contended for by appellants, and, moreover, remanded the case for proceedings in accordance with that opinion. Agreeably thereto a new trial was had, resulting in the judgment appealed from in the instant case.

Appellants amended the eighth defense in their answer referred to by SEDGWICK, J., and the same now sufficiently alleges the bar of the former suit. Appellants contend that for this reason the case now falls within the rule announced in the vacated opinion, reported in 74 Neb. 232.

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We do not understand that the opinion was vacated solely for the reason that the bar was not sufficiently pleaded, but because an action in equity would lie to recover the rents and profits; the land previously subjected to the payment of the bank's claim being insufficient therefor.

We recommend that the judgment of the district court be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed June 26, 1908. *Judgment of affirmance vacated and judgment of district court reversed:*

Res Judicata. "The plea of *res judicata* applies not only to the points upon which the court was required by the parties to pronounce a judgment, but to every point which properly belonged to the subject matter of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time. This rule is not inflexible, and may yield in cases where a good and valid reason or excuse for the failure to allege the facts and seek relief in the former action is shown, but in the instant case such excuse is neither pleaded nor proved." *First Nat. Bank v. Gibson*, 74 Neb. 232.

REESE, J.

It would serve no good purpose to give an extended history of this case, for the reason that a sufficient statement is contained in the last opinion by Commissioner EPPERSON, *ante*, p. 577, and the many prior opinions upon the case found in the reports. After the filing of the last opinion, a motion for rehearing was filed and sustained, and the cause was rebriefed, reargued, and submitted to the court. That opinion is founded largely upon the last prior opinion written by Chief Justice SEDGWICK, and it was held that that and other opinions and decisions of this court were conclusive of the case upon the contention of defendant that the decree in the prior suit (60 Neb.

767) was a final adjudication of the rights of the parties involved in this suit. The commissioner says: "Appellants' sole contention is that the bank's right in the present suit to have the rents and profits applied to the satisfaction of its claim could have been determined in the action to set aside the fraudulent conveyance (57 Neb. 246; 60 Neb. 767), and, hence, the judgment in that case is a bar to the relief now sought. This identical question was an issue in this court when this case was here before. As reported in 74 Neb. 232, the conclusions first announced were favorable to defendants' (appellants') present contention. Upon rehearing, the former judgment was vacated (74 Neb. 236), and the conclusion announced there, we consider, resolved this question adversely to appellants." It is not deemed necessary to quote further from the opinion, as it consists to considerable extent of quoting the discussion presented by the chief justice. The conclusion is that that last decision is a final adjudication of the point involved, and must be accepted as closing the door upon defendants.

In order to a full understanding of this subject, it is necessary for us to consider the former opinions found in 74 Neb. 232, 236. The former of these opinions was written by Judge LETTON while on the commission. In that opinion it was held that the issues involved and triable in the former suit constituted a bar to this action. After a full discussion of the subject, the commissioner said: "It is unnecessary to discuss any other of the numerous assignments in the briefs of both plaintiff in error and of the appellant, since these considerations dispose of the case. We are of the opinion that the former recovery is a bar to this action, and that the judgment of the district court should be reversed and the cause dismissed." That opinion was approved by the court, and it was ordered that, "for the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause dismissed." The opinion was filed, and the order dismissing the case was made, June 22, 1905. For some reason,

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not stated in the report, Judge SEDGWICK did not sit in the case. A motion for rehearing was made and sustained. The grounds assigned for the rehearing were: "(1) That the sole ground upon which the finding of dismissal was based was adjudicated in the former decision of this court, and a conclusion reached in favor of plaintiff. (2) That the sole ground upon which said dismissal is based was not within the issues of the case. (3) That the conclusions reached by the court in this case are in direct conflict with the conclusions reached in the former adjudication. (4) The authorities cited in the opinion do not tend to sustain it."

The final opinion, upon the rehearing, was written by Chief Justice SEDGWICK, and filed January 18, 1906, in which it was held that the question of former adjudication was not sufficiently presented by defendants' answer, and that, under the pleadings, there was no such issue in the case. In the opinion it is said: "There is no sufficient plea in bar in the answer. The petition sets out all the facts in regard to the former action and its results, and in regard to the foreclosure proceedings in the federal court, and the application of the land in payment of the judgment upon those proceedings. These allegations of the petition are admitted in the answer, and there is in the answer what is called the eighth defense, in which it is alleged, 'that the suit brought by the plaintiff against this defendant and commenced on or about the 7th day of August, 1899, was an action in equity, wherein and whereby the plaintiff sought to recover of this defendant all and singular the relief to which the plaintiff was or might be entitled by reason of the several matters and facts in the petition in said suit set forth with reference to said land, and whereby the court awarded to the plaintiff the relief asked by the same, and all and singular the relief herein asked in this petition might have been awarded to the plaintiff in said suit if the plaintiff had established its right thereto; that the plaintiff had full power and opportunity to ask the relief now herein sought.

and the court had full power and authority to grant the same. This defendant alleges that by reason thereof the plaintiff's cause of action herein is barred by a former recovery, and the plaintiff by reason thereof is not now entitled to have and maintain this action.' None of the facts which were supposed to constitute this defense was pleaded in the answer. The plea amounts only to conclusions of law derived from the allegations of the petition. No reply to this defense was necessary."

It is true that other questions are discussed and decided in the opinion, which we need not here notice, but we think enough is here shown to clearly indicate that the question of the former adjudication was not decided, for the reason that it was not sufficiently put in issue by the answer. The opinion of the court, as written by Judge LERTON, when commissioner, fully discusses that question, and decides it in favor of defendant upon the theory that the issue was made and presented in the answer. The judgment of the district court being reversed, and the cause having been remanded for further proceedings, defendants obtained leave in that court to amend their answer, and, the amended pleadings having been filed to meet the requirements of the opinion of the chief justice, the cause was again tried under the new issues, and the question is now before us, if not at the former hearing, for decision. When we consider the opinion by Judge LERTON, holding that the former adjudication was a bar, the judgment of the court thereon, the motion for a rehearing based in part upon the ground that the averments of the answer were not sufficient to present that issue, the opinion of the chief justice, and the holding of the court sustaining plaintiff's contention on that behalf, the subsequent amendment of the answer on that particular subject, its presentation to the district court and to this court, we are persuaded that the former holding well nigh forecloses the subject, and that, as the case now stands, the holding on that decision should be adhered to as covering the conditions now presented. We have carefully considered the

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former opinion, the opinions by the chief justice and Commissioner EPPERSON, and are convinced that Judge LETTON's views were correct, probably upon the issues as then formed, but certainly as they now stand, and that the holding in that case must be reaffirmed and readopted.

Our former judgment is therefore vacated, the former recovery held to be a bar to this action, the judgment of the district court reversed and the cause dismissed.

REVERSED.

LETTON, J., not sitting.

AMANDA E. WETHERELL, APPELLEE, v. FRANK G. ADAMS
ET AL., APPELLANTS.*

FILED JANUARY 23, 1908. No. 15,016.

1. **Appeal: CONFLICTING EVIDENCE: FINDINGS.** Where the evidence in the district court consists of oral testimony which is in sharp and irreconcilable conflict, and the conclusion derivable therefrom is dependent in part upon inferences from circumstances, some of which are in dispute, and in part upon the weight and credibility of testimony to be determined from the degree of competency of the witnesses, their opportunity for knowledge and the apparent clearness of their recollection, and the reasons therefor, the findings of the trial judge will be considered in determining the issues in this court. *Cooley v. Rafter, ante*, p. 181, followed and approved.

2. Evidence examined, and held sufficient to support the findings of the trial court.

APPEAL from the district court for Merrick county:
CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Martin & Ayres and John J. Sullivan, for appellants.

Patterson & Patterson, contra.

GOOD, C.

Plaintiff brought this action in the district court to cancel and set aside a deed of conveyance to 80 acres of land

* Rehearing denied. See opinion, p. 589, *post*.

in Merrick county, and to quiet the title to the premises in her. The defendants, who are husband and wife, answered, alleging title in the husband and asking that his title be quieted. Upon a trial of the issues the district court found in favor of the plaintiff, and entered a decree in conformity with the prayer of her petition, and awarded to the defendants a lien upon the premises for \$42 for permanent improvements made by the defendants. From that decree the defendants have appealed to this court.

The appellants, Frank Adams and wife, are the son and daughter-in-law of the appellee. The following is a substantial statement of the facts out of which this controversy arose: Amanda E. Wetherell and her husband separated. Each was the owner of real estate, and upon their separation they entered into a contract whereby each released, or attempted to release, to the other any rights that the respective parties may have been entitled to in the lands of the other by reason of their marital relation. Amanda E. Wetherell owned the 80 acres in controversy, and leased the same unto the appellants, and resided with them. Mrs. Wetherell had two other children, daughters both of whom were married. It appears that Mrs. Wetherell had promised that the 80 acres in controversy should be given to her son at her death. The rental for the 80 acres was \$110 a year, and from her scanty income she was unable to make such repairs and improvements upon her premises as she desired to have thereon. They discussed the question of making these improvements and repairs, and he was willing to make them, provided he was assured that the premises would be given to him at his mother's death. They decided to go to Central City and arrange for drawing such papers as would vest the title to the land in Mr. Adams at her death. On the 20th day of January, 1905, they went to the office of Patterson & Patterson, attorneys at law, in Central City, where Mrs. Wetherell had them prepare a will, which she executed, wherein the premises were devised to Adams. After this was done, it seems that he was still not satisfied, and had

some fears that the contract entered into between Mrs. Wetherell and her husband would not be sufficient to cut off any rights her husband might have in the land, in the event that he should survive her. Thereupon a deed was drawn, signed and acknowledged by Mrs. Wetherell, conveying the premises to Adams, and at the instance of Patterson & Patterson a life lease of the premises from Adams to Mrs. Wetherell was prepared and signed by him. It seems to have been understood and agreed at the office of Patterson & Patterson that the deed and lease were not to be delivered. The will, the deed and the lease were placed in one envelope and given to Mrs. Wetherell. The question arose as to where the papers should be kept. Some one suggested that they should be left in the custody of Patterson & Patterson, but Mrs. Wetherell said that she had a safety deposit box in a bank at Clarks, where she would place them. Thereupon Mrs. Wetherell handed the envelope, containing all the papers, to Adams, asking him to put them in his pocket to carry them home for her, and that on their way home they would stop at Clarks and leave them at the bank. Up to this point there is practically no controversy as to the facts. The appellants claim that after reaching home, and after they had eaten their supper, the papers were read over and examined by them in the presence of Mrs. Wetherell, and that further conversation ensued with reference to the making of the repairs and improvements, and that Adams then claimed that he was unwilling to go ahead and make the repairs unless the deed was delivered to him, and that, thereupon, Mrs. Wetherell consented to his taking the deed. The appellants claim that Mrs. Wetherell requested that the deed should not be recorded, because it might lead to unpleasantness with her married daughters. Mrs. Wetherell denies entirely this conversation, and claims that she never delivered the deed, nor authorized the delivery, and that she entrusted the papers to Adams to place in her box in the bank at Clarks. In the month of June following Mrs. Wetherell assigned to Adams a fire insurance policy

covering a part of the buildings upon the premises. At this point it should be remarked that Mrs. Wetherell was practically blind and unable to read, and she claims that she did not know that she was assigning her policy of insurance to her son, but believed that it was a new insurance policy which was being taken out, and which, she was informed, it was necessary for her to sign. The appellants both claim that the assignment was read over to her and that she fully understood it. In December following this a disagreement arose between Mrs. Wetherell and her daughter-in-law, and Mrs. Wetherell left the home of her son and went to the home of one of her married daughters. Thereupon the son caused the deed to be recorded. Mrs. Wetherell's daughter saw in the newspaper the reported transfer of the real estate and informed her mother, who immediately instituted this action to cancel the deed and quiet the title.

It will be seen that this action hinges upon the question as to whether or not there was a delivery of the deed by Mrs. Wetherell to her son. There is a sharp and irreconcilable conflict in the testimony. It appears that Adams made certain improvements upon the premises in the way of a workshop, planting some trees and some tame grass seed, and papering and painting the interior of the house, and that he paid the taxes upon the land for the year 1905. All that he did in this respect would be consistent with the claim of Mrs. Wetherell that he was to make the improvements upon the understanding that he was to have the property at the death of his mother. There are certain circumstances that tend to corroborate Mrs. Wetherell's testimony. It would seem that Adams was entirely satisfied to make the improvements and repairs if he could be assured that the land would be his at his mother's death. To accomplish this purpose her will was executed. He seems then to have had some fears of the claims of Mr. Wetherell, and for that reason desired the deed. This deed was signed and acknowledged, but it was agreed between them that it should not be delivered until Mrs.

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Wetherell's death. While it is, perhaps, plain that this deed had no efficacy while undelivered, yet it was sufficient to satisfy Mr. Adams, and it is not apparent that anything came up, or any new information came to him, to cause him to change his mind. It is somewhat singular, then, that if he was satisfied to make the repairs and improvements on the condition that he was to have the land at his mother's death, and believing that this was accomplished by the will and the deed, he should then refuse to make the repairs and improvements until the deed was delivered to him. Again, the evidence indicates that Mr. Adams was a man of intelligence, and he appears to have been very cautious and prudent in his dealings with his mother. It is somewhat singular that one so prudent and cautious should permit the insurance policy to stand for five months without being assigned. And if, as he asserts, Mrs. Wetherell consented that the deed should be delivered, and that he should do with it as he pleased, it is somewhat remarkable that one so cautious and careful should not have had the deed recorded for eleven months after its delivery. There was also evidence of the fact that Mr. Adams had had access upon one or more occasions to Mrs. Wetherell's private box in which she kept her papers in the bank at Clarks. Under all these circumstances, we do not think it can be said that the evidence preponderates in favor of the appellants. The burden of proof was upon the appellee. The evidence was in direct conflict. The witnesses were personally before the trial judge, who had, an opportunity to judge of their fairness and candor; and these facts were, doubtless, considered by the trial court in finding the issues in favor of the appellee.

While the parties to this suit are entitled to a trial *de novo* in this court, yet this court has held, in *Cooley v. Rafter*, ante, p. 181: "The rules laid down by this court for its guidance in such cases in *Faulkner v. Simms*, 68 Neb. 299, as well as in subsequent cases decided under the present statute, are sound and indispensable to the due

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administration of justice. The trial judge, who knows the parties and who personally presided over the examination of the witnesses and observed their demeanor, is far more competent, in most cases, to weigh their testimony and deduce correct conclusions therefrom than can this court be, having before it nothing more than an unresponsive written record. The findings of the trial court in such cases will be considered in determining the issues in this court. The whole evidence, however, will be examined, and the issues determined anew." We are in entire accord with this statement of the law, and think that it is peculiarly applicable to the case at bar, and that under this holding we cannot conscientiously say that there was any error in the findings of the trial court.

The judgment of the trial court is amply supported by the evidence, and we therefore recommend that it be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on motion for rehearing was filed June 4, 1908. *Rehearing denied*:

Judgment: CONCLUSIVENESS. Where the validity of a certain deed was the sole issue tried in an action *quia timet*, a decree of the court "that the title to said premises be forever quieted in said plaintiff" will not bar defendants from asserting rights to possession or title acquired by virtue of other contracts.

EPPERSON, C.

A statement of the facts may be found in the opinion, *ante*, p. 584. Plaintiff's action is founded entirely upon the alleged surreptitious possession by defendants of the deed in controversy. In their answer defendants pleaded the delivery of the deed to them. The evidence, however, discloses that at the time of the execution of the deed the

defendants were in possession of the land under a lease which expires March 1, 1909. This lease apparently was superseded by a contract of the parties contemporaneous with the execution of the deed. Plaintiff agreed to devise the land in controversy to her son, the defendant Frank G. Adams, and during plaintiff's lifetime defendants were to have possession, use and control of the land, for which they were to pay plaintiff \$110 annually during her lifetime, and in addition thereto agreed to make certain improvements upon the land. The court decreed "that the title to the said premises be forever quieted in said plaintiff."

It is now contended upon a motion for a rehearing that the decree of the court which we affirmed will bar the defendants from asserting whatever right or title they may have under the contract above referred to. We considered that defendants' right to the land derived from the possession of the deed only was pleaded, tried or determined, and the decree of the court only quiets and confirms the plaintiff's title as against the deed, which it is adjudged was never delivered. The judgment must not be taken as a bar to whatever rights the defendants have or may have hereafter under the contract of the plaintiff to devise the land to her son, nor under the contract for possession during her lifetime.

With this construction placed upon the decree of the court it is apparent that a rehearing is unnecessary, and we recommend that the defendants' motion be denied.

By the Court: For the reason given in the foregoing opinion, defendants' motion for rehearing is

OVERRULED.

G. SAM ROGERS, APPELLEE, v. CITY OF OMAHA, APPELLANT.

FILED JANUARY 23, 1908. No. 15,371.

1. **Cities: CONTRACTS: VALIDITY.** Where a municipal corporation enters into a contract which, under the existing law, it was authorized to make, but where the procedure laid down by the statute was not followed, the contract is not *ultra vires*, but irregular, and the contractor or his assignee may maintain an action to recover a remainder due upon such contract.
2. **Limitation of Actions: ACKNOWLEDGMENT OF DEBT.** A warrant issued by the proper authorities of the city in consideration of a valid indebtedness against it is a written acknowledgment of such indebtedness and a promise to pay, and arrests the running of the statute of limitations.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

H. E. Burnam, I. J. Dunn and John A. Rine, for appellant.

W. A. Saunders and E. C. Strode, contra.

GOOD, C.

This is an action to recover from the city of Omaha a balance on a contract for grading a part of Mason street in that city, and is for the second time before this court for consideration. The former opinion appears in 76 Neb. 187, where a sufficient statement of the facts will be found. After the cause was reversed and remanded, a second trial was had in the district court, resulting in a judgment for the plaintiff, and from that judgment the defendant has appealed.

The second trial in the district court was upon the same issues that were presented in the first, and the same issues are now involved that were presented when the case was first before us. Several questions are argued with much earnestness in the very able and elaborate brief of the appellant, but the case must be disposed of upon the ques-

tions decided in the former opinion. The soundness of the rulings in the former opinion on both the questions that the contract was not *ultra vires* and that the action was not barred by the statute of limitations is vigorously assailed, and we are asked to disapprove the former holdings. In effect, we are asked on this appeal to grant a rehearing on the questions disposed of in the former opinion. We have reexamined the questions presented upon the former hearing and again presented in this appeal, and have reached the same conclusions that were reached in the former opinion.

Appellant urges most strenuously that the city council did not have the power to make the contract until a petition, signed by the owners of a majority of the foot frontage, had been filed asking for a change of grade, and that until such petition had been filed the action of the mayor and council in awarding the contract was not within their power, and the contract was therefore *ultra vires*. In this view we cannot concur. The power to change the grade of the street was vested by statute in the mayor and council. No new legislation was necessary to authorize such action. The power to change the grade is conferred by section 109, ch. 12a, Comp. St. 1903. Said section and the ones immediately following prescribe the manner of exercising this power. As long as the city was authorized to change the grade of the street under the legislation then existing, it cannot be properly said that, because the manner of exercising that power laid down by the statute was not strictly followed, the action of the mayor and council was *ultra vires*. Properly speaking, *ultra vires* contracts of a municipal corporation are such as the corporation has no power to make under any circumstances or for any purpose. A contract of a municipal corporation is *ultra vires* in its proper sense when it has no power under the existing legislation under any circumstances to enter into such contract. Such a contract, of course, is wholly void and gives rise to no rights. The objection to such a contract is not merely that the corporation should not have

made it, but that it had no power to make it. But, in the case at bar, by the statute then existing the mayor and council were given the power to change the grade of the street and to award contracts for perfecting such change. Where the municipal corporation has the power to make the contract, but fails to follow the procedure laid down by the law for making of the contract, it cannot properly be said to be *ultra vires* and void, but is merely irregular. Such was the former holding, and we believe it to be sound, and it should be adhered to.

With reference to the statute of limitations, appellant contends that that question was not decided by the trial court on the first trial, and that it was not properly before this court upon the former hearing. However that may be, it does not in anywise affect the correctness of the holding. In the case of *City of Omaha v. Clarke*, 66 Neb. 33, cited in the former opinion, it was held that, where an award had been made by the proper city officers upon a claim for damages, the statute did not begin to run until the time of the filing of the award, and that such award was a record obligation in writing on which an action would lie for five years. In the case of *Abrahams v. City of Omaha*, ante, p. 271, it was held that a warrant issued by the proper authorities of the city in consideration of a valid indebtedness against it is a written acknowledgment of such indebtedness and a promise to pay it, and arrests the running of the statute of limitations. So far as the statute of limitations is concerned, that case is identical with this one. In both actions warrants were issued against a special fund which had never been created, and where the city became liable upon a contract obligation. The holding in that case is conclusive in this case. The action was not barred by the statute of limitations.

It follows that the judgment of the district court is right, and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ACME HARVESTER COMPANY, APPELLEE, v. HENRY H. CARROLL, APPELLANT.

FILED JANUARY 23, 1908. No. 14,976.

1. **Sales: RESCISSION.** "A harvesting machine was sold under a warranty which provided that 'if it could not be made to work well it would be taken back if returned immediately to the agent of whom purchased and the cash payment refunded and the notes given therefor returned.' *Held*, That after the purchaser had used the machine a part of two harvests he could not rescind the contract, even though the machine failed to comply with the warranty." *Clark v. Deering & Co.*, 29 Neb. 293, reaffirmed.
2. **Evidence examined, and held** to fully sustain the findings and judgment of the district court.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

A. N. Sullivan, for appellant.

Matthew Gering, contra.

FAWCETT, C.

This action was brought by appellee against appellant, Henry H. Carroll, and his wife, Carrie, upon a promissory note, dated June 13, 1903, given to appellee for a combined reaper and header, purchased on that date from appellee by appellant, Henry H. Carroll. Defendant, Carrie Carroll, interposed the defense of coverture, which was sustained by the trial court, so that the case now before us stands upon the appeal of Henry H. Carroll from the judgment against him on the note referred to.

One of appellant's assignments of error is "miscon-

duct of appellant's (appellee's) attorney." An examination of the record fails to disclose any evidence to convict appellee's attorney of such charge. Counsel for appellant argues the questions of "accident and surprise," "newly discovered evidence," and "the measure of damages." As none of these three alleged errors appear in the assignment of errors, filed as required by rule 34, they cannot be considered. *Erck v. Omaha Nat. Bank*, 43 Neb. 613; *Raker v. State*, 50 Neb. 502; *Phoenix Ins. Co. v. King*, 54 Neb. 630.

This leaves for consideration the questions as to whether the judgment is sustained by sufficient evidence, and whether or not the law has been properly applied to the evidence. The case was tried to the court without the intervention of a jury, and its findings, upon the questions of fact presented by the evidence, cannot be disturbed unless they are clearly wrong. The record disclosed that appellant purchased the machine under written contract, reading as follows: "All our machines are warranted to be well made, of good material, and, with proper usage and management, to do good work. If, in one day's trial, any machine does not perform as above, the purchaser agrees to notify Acme Harvester Company, at its principal office at Peoria, Ill., and the agent from whom he purchased the machine, by registered letter or telegram, and allow them time to get to the machine and remedy the defect, if there be any (if it be of such a nature that a remedy cannot be suggested by letter), the purchaser rendering necessary and friendly assistance. If the machine cannot be made to fill the warranty, it shall be returned by the purchaser to the place where received, and another furnished which shall perform the work, or the money and notes which shall have been given for same returned, and no further claim made on Acme Harvester Company. It is further mutually understood and agreed that continued possession of said machine after the expiration of the time named in the above warranty shall be evidence of fulfillment of the warranty to the full satisfaction of the purchaser, who agrees thereafter to make no further claim on

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Acme Harvester Company; and further, that any alterations or erasures made in the above warranty, or in this special understanding and agreement, are unauthorized and void."

Without going into the evidence in detail, it is sufficient to say that the machine was shipped by appellee to appellant's farm in Kansas; that appellee sent an expert to set up the machine and put it in operation; that appellant used it during the entire harvest of 1903, and again during the harvest of 1904. Appellant testifies that during this time the machine did not do good work; that he made numerous complaints to appellee, and that, by reason of the unsatisfactory or bad working of the machine, he lost a portion of his crop in 1903, and again in 1904, the value of which crops, together with other expenses incurred by him, he seeks to recover of appellee as damages resulting from the failure of the warranty. The evidence also shows that he never returned the machine to appellee, nor to the agent from whom he purchased it, but kept and used it, and that it was still upon his premises at the time of the suit; that an agent of appellee made three trips to appellant's place in Kansas in the summer of 1904, but was never able to find appellant at home; that on one of those trips he took with him an expert to put the machine in order; that they examined the machine, and could discover nothing wrong with it, except a few breakages, the total repairs of which would cost not to exceed \$7 or \$8; that he told appellant's son, a young man 20 or 21 years of age, that he would be in a little town nearby for several days, and that if his father would come in and pay the note he would give him all the repairs he needed, but that appellant never called for such repairs, and never has paid the note.

We think the evidence also fairly shows, not only that appellant never in fact returned the machine to the company or to the agent from who he purchased it, but that he never even offered to return it until after the maturity of the note and when payment thereof was demanded by ap-

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pellee's representative. We think the findings and judgment of the court are fully sustained by the evidence and were in strict conformity to the law governing such a case. *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210; *Edgerly v. Gardner*, 9 Neb. 130; *Clark v. Deering & Co.*, 29 Neb. 293.

We therefore recommend that the judgment of the district court be affirmed.

AMES and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FIRST NATIONAL BANK OF COLUMBUS, APPELLEE, V. STATE
OF NEBRASKA, APPELLANT.

FILED JANUARY 23, 1908. No. 14,974.

A public office cannot be created, and its powers, duties and emoluments prescribed, by concurrent resolution.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Reversed and dismissed.*

W. T. Thompson, Attorney General, and *W. B. Rose*,
for appellant.

Reeder & Hobart and *J. J. Sullivan, contra.*

AMES, C.

The legislature adopted in 1897 a measure entitled "Concurrent Resolution," and having prefixed thereto the usual enacting clause. After a series of preambulatory "whereases," it is by this measure "resolved by the house of representatives, the senate concurring therein, that the governor be and is hereby authorized to appoint a committee of three competent persons whose duty it shall be to carry

out the intent and purpose of this resolution." Such intent and purpose is thereupon recited to be to "ask the assistance of the interstate commerce commission" and boards of railroad commissioners of certain sister states and of the territory of Oklahoma in procuring for the citizens of said states and territory (and of this state also, we presume) "just and equitable freight rates, and if necessary, as a last resort, to consider the propriety of building an interstate railroad to the Gulf of Mexico." It was further "resolved, that said committee shall receive a compensation not to exceed three dollars and actual expenses for each day's service, which claims for services and expenses shall not be valid until the same shall be examined and approved by the governor." The measure was, after its passage, signed by the presiding officer of each house and presented to and approved by the governor. Shortly afterwards the governor appointed Warwick Saunders and two other persons to serve as such committee, and Saunders at various dates and times during the summer of 1897 presented to the governor itemized claims for "salary" and expenses to which he deemed himself entitled, and which the governor certified in writing to having examined and found correct, and which the latter approved as valid claims against the state, accrued pursuant to the resolution. These claims, thus certified, Saunders embodied in duly executed vouchers which he presented to the auditor of public accounts, from whom he demanded warrants in payment therefor upon the state treasurer. The auditor rejected the claims, which were thereupon assigned by Saunders to the plaintiff, the First National Bank of Columbus, Nebraska, and the latter appealed from the decision of the auditor to the district court for Lancaster county. Upon this state of facts, which is admitted by the pleadings, the court reversed the decision of the auditor and rendered a judgment in favor of the plaintiff for the aggregate sum of \$455.57. The state, by the attorney general, appealed to this court.

The task of exposition has been considerably abridged

by an agreement by counsel, implied in their briefs and explicit in oral argument, that if the object of the resolution is one which requires for its accomplishment the enactment of a public law, as distinguished from a temporary legislative or administrative regulation, the judgment appealed from is erroneous. That it is such we entertain no doubt. It is not now necessary to attempt the formulation of a general rule for the ascertainment of those things which may or may not be done by concurrent resolution, but we think it quite safe to say that one of the things which cannot so be done is the creation of a public office and endowing it with powers and duties and emoluments or compensation. Such a measure is one which affects or may affect the public and private interests, the life, liberty and property of every citizen, and it can be enacted, if at all, only by public law. An appropriate title for the measure under consideration would have been "A bill for an act creating a commission to solicit the aid of the interstate commerce commission and of the railroad commissions of Kansas, Texas and the territory of Oklahoma for the procurement of equitable freight rates for the citizens of said states and territory and to consider the propriety of building an interstate railroad to the Gulf of Mexico." There is nothing contained in this measure that is regulatory of any existing office or institution, or that purports to control or direct the conduct of, or to confer any powers or duties upon, any existing functionary; but it attempts to create an independent official body, a sort of gubernatorial commission, somewhat analogous to the English royal commission, but for whose functions and compensation legislative provision was deemed to be requisite because of the deprivation of the office of governor of the remnant of qualified legislative power pertaining to kingly prerogatives. No time is fixed within which the commission shall expire, and the methods it shall adopt and the expenses it shall incur are, subject to the approval of the governor, left to their sole discretion. The governor is given no power to discharge them, and they

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are not required to make any official report of the results of their inquiry, and it is left solely to his discretion and approval what amount of expense they shall incur or for what immediate purposes, which, apparently, may extend to the procurement of surveys, drawings and estimates by engineers, proposals by railway contractors, and the exploitation of the market for railway securities; or, on the other hand, the solicitation of assistance may be limited to four postal cards at a total expense of four cents, and the consideration of "the propriety" of gulf railway construction to silent philosophical contemplation.

Whether such a body, with such vague and indefinite powers, wholly free from control or responsibility, and of perpetual duration, can constitutionally be created by any form of legislation, we do not express an opinion; but we are convinced that such a feat cannot be accomplished by a mere concurrent resolution, and we therefore recommend that the judgment of the district court be reversed and the proceeding dismissed.

FAWCETT and CALKINS, CC., concur.

By the Court: We concur in the conclusion reached in the foregoing opinion, and the judgment of the district court is reversed and the proceeding dismissed.

REVERSED AND DISMISSED.

BENJAMIN F. MOORE, APPELLANT, v. ROBERT F. NEECE ET AL., APPELLEES.

FILED JANUARY 23, 1908. No. 15,030.

Statutes: VALIDITY. When the legislative journals show affirmatively that a bill which has passed one house has been amended in the other before final passage thereby, and that such amendments have not been concurred in by the house in which the measure originated, and also show affirmatively that such amendments

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have not been receded from with the assent of a majority of all the members elected to the house by which they were made, the bill is void as a measure of legislation.

APPEAL from the district court for Sioux county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

Allen G. Fisher, for appellant.

R. L. Wilhite and M. F. Harrington, contra.

AMES, C.

In January, 1903, defendants Robert F. and Margaret Neece, for the purpose of securing payment of part of the purchase price of a tract of land conveyed to the latter, executed and delivered to the vendor, the defendant Allison, their negotiable promissory note, payable four years after date, with interest at the rate of 7 per cent. per annum payable annually, and also executed and delivered a mortgage upon the land conditioned for the payment of the note, and containing a covenant to the effect that upon default in payment of any instalment of interest the holder of the note might declare the whole amount of principal and accrued interest due and payable, and enforce the mortgage by foreclosure accordingly. In July of the same year Allison, the payee, for a valuable consideration indorsed and delivered the note and assigned the mortgage to the plaintiff, who has since remained and now is the owner thereof. In May, 1904, default having occurred in the payment of the first instalment of interest reserved by the note, the plaintiff exercised the option expressed in the covenant above mentioned, and began an action for a foreclosure of the mortgage, making parties thereto both the defendants Neece, and their grantees of the premises, and Allison the indorser. This action proceeded regularly to decree, sale and confirmation. At the time of the confirmation the amount of the proceeds of the sale applicable to the payment of the mortgage debt was deficient of the amount of the latter, with accrued interest,

in the sum of \$10,192.73, and the court at that time made and entered, on the application of the plaintiff, an order that he be permitted to withdraw the note from the files, "and that the plaintiff herein, Benjamin F. Moore, be and is hereby granted and adjudged the right and authority to commence an original action on said note, so withdrawn from the files of this court, against Robert F. Neece and Margaret Neece, as makers thereof, and Peter Allison, as indorser thereon, for the recovery of any deficiency or residue that may remain unpaid on said note after the proper application of the proceeds of said sale of real estate thereon." This action was brought pursuant to the foregoing order, which is recited in the petition. There is no dispute about the facts. The defendant Allison filed an answer, but it differs from the petition only in the respect that it recites the foregoing facts somewhat more fully than does the latter. The defendants Neece filed separate answers, each to the same effect as the foregoing. Upon a trial before the court there was a judgment for the defendants, from which the plaintiff appealed.

The litigation involves two questions with respect to chapter 95, laws 1897, entitled "An act to repeal sections 847 and 849 of the code of civil procedure relating to deficiency judgments, and to amend section 848 of said code of civil procedure by striking out the last five words of said section, namely: 'unless authorized by the court.'" The first of these questions relates to the validity of the said chapter, having reference to its form and the manner of its passage, and the second relates to its interpretation and effect, if it is valid. The former of these questions has given rise to several inquiries, the first of which in natural order seems to be whether the measure passed the two houses in such manner that it can be affirmed that in its present form it expresses the joint will of a constitutional majority of each. Under the rules adopted by former decisions of this court this question can be determined only by an examination of the journals of the two houses.

The history of the measure, as disclosed by the record, is as follows: The bill was introduced in the senate and read a first time as senate file No. 108 on the 20th day of January, 1897. On subsequent days of the session it went duly and regularly through the usual and necessary stages of consideration in that body, and on the 19th day of March was read a third time and put upon its passage and passed by an affirmative vote of 21 senators. On the following day it was reported to and read a first time in the house of representatives, and on the next day read a second time and referred to general file. On March 25, the committee of the whole house reported the bill back with mention of amendment, but with a recommendation that it be indefinitely postponed. Thereupon a motion was made that the report of the committee be not concurred in, "but that the original bill as printed and without any amendments be ordered to a third reading." A point of order was made against this motion "that a motion to amend a bill or strike out a portion of such bill, when the report of the committee of the whole was before the house, was not in order." The point of order was overruled, and the motion, being put, was defeated by a vote of 47 to 46; 6 members being absent or not voting. On March 31 the bill was read a third time, and the speaker announced that, it "having been read at large on three different days, and the same with all its amendments having been printed, the question is: 'Shall the bill pass?'" There were 58 votes in the affirmative and 24 in the negative, and 17 members were absent or not voting, and the measure was duly declared passed. On the 1st day of April the senate voted to nonconcur "in the house amendments to senate file 108," and on the same day this action was by the secretary of that body reported to the house. On the next day, April 2, a motion to recede from the house amendments received 43 affirmative and 39 negative votes; 17 members being absent or not voting. The motion was declared carried, and so reported to the senate by the clerk of the house. The bill with the customary certifi-

cates was then signed by the presiding officers of the two houses and presented to the governor for his consideration.

This record can leave no reasonable doubt in any mind familiar with it that the bill was amended by the house after its passage by the senate and that the amendments were not concurred in by the latter body. What was the number or nature of those amendments we are without sufficient knowledge upon which to base even a conjecture. But we do know that the number of absentees, both on the vote on the final passage in the house and on the vote therein to recede from the amendments, was the same, namely, 17. And we know, also, that with the exception of 5 members the absentees on both occasions were the same persons, and that on the passage of the bill 4 of these 5 persons voted in the affirmative and 1 in the negative. Now, if we suppose these 5 persons to have been present when the vote to recede was taken, and to have voted to the same practical intent and purpose to which they did vote on the final passage, the number of affirmative votes on the motion to recede would have been increased to 47 and the negative to 40. It is a demonstration, therefore, that 11 members who voted "aye" on the final passage voted "nay" on the motion to recede. The presumption is, therefore, well-nigh irresistible that by these 11 members the amendments were regarded as of so great importance as to be decisive of their votes on both occasions, and, if the latter had been absent or cast in the negative when the bill was upon final passage, that measure would have received but 47 affirmative votes and would have been defeated. It is not unfair to assume that the 4 absentees on the last occasion, who voted "aye" on final passage, would, if they had been present, have swelled the negative vote to 43, and the motion to recede would have failed for want of a majority of the votes cast thereon. This last assumption is strengthened by the fact that the motion to order the bill to a third reading without amendment was lost by a vote of 51 to 32, and that of those then voting with the majority 9 were members who were absent

when the vote was taken on the motion to recede. Presumably, therefore, if all these 9 persons had been present on the latter occasion the negative vote would have been increased from 39 to 48. Of the remaining 8 members, 3 were absent on both occasions. If the still 5 remaining absentees had been present and had voted for the motion to recede, the total affirmative vote would have been but 48 and the motion would still have been lost for want of a majority voting thereon.

The governor did not exercise his power to veto, but neither did he approve the bill, but he transmitted it to the secretary of state, by whom it was certified and published in the printed volume of laws of the session. But it is clear to a demonstration that the measure, as so filed and published, was never assented to by a majority of the members elect of both houses of the legislature, and, in our opinion, the inevitable consequence is that it has never become a law. To put the matter briefly: It is clear from the record, beyond doubt or cavil, that a majority of all the members elected to the house expressly refused to pass the bill without the amendments, and the record shows with equal conclusiveness that such a majority never retracted that refusal. In *Hull v. Miller*, 4 Neb. 503, it was held, in effect, that, when the journal of either house recites that amendments made by the other have been submitted to a vote and have been concurred in, the presumption is that the recital is true and the requisite vote has been cast in their favor, and that it is not necessary for that purpose that the roll of members shall be called and their votes entered upon the record; but this is not equivalent to holding that, when the journal discloses that the roll was called and the vote was recorded, and the evidence thus furnished is conclusive that a majority of the members elect did not assent, the concurrence of a majority of those present and voting is sufficient for the adoption of the amendments. Such a rule would violate the spirit, if not the letter, of the constitution. Provisions of the greatest importance and

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of far-reaching effect are frequently brought into legislative bills by amendment. A majority of the members elected to each house constitute a quorum for the transaction of business. If the contention of counsel for appellees is upheld, then the affirmative vote of 26 members of the house or of 9 in the senate is sufficient for the adoption of such amendments, although the journals show affirmatively that 25 members in one case and 8 senators in the other are present and vote in the negative. If this practice can be upheld as valid legislation, the requirement of section 10, art. III of the constitution, that "no bill shall be passed unless by assent of a majority of all the members elected," etc., may easily be evaded and will soon become of little practical force or effect. Of course, the same considerations prevail, with even greater reason, with respect to the vote requisite for recession from amendments after they have been formally incorporated into a bill and have been solemnly adopted by a vote on final passage. To permit less than a constitutional majority afterwards to eliminate them from the bill by a vote of recession would be to defeat the manifest object of the constitutional provision, which is to require the concurrence of a prescribed majority of each house in every measure of legislation.

The conclusion thus reached disposes of this appeal, and dispenses with a decision of the remaining questions raised and argued by counsel, none of which is likely to recur in this case.

We recommend that the judgment of the district court be reversed, and a new trial granted.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and a new trial granted.

REVERSED.

H. F. CADY LUMBER COMPANY, APPELLEE, v. WILSON
STEAM BOILER COMPANY, APPELLANT.

FILED JANUARY 23, 1908. No. 15.045.

1. **Appeal: VERDICT: EVIDENCE.** When a verdict of a jury is found from conflicting testimony, this court will not inquire into the preponderance of the evidence.
2. **Trial: EVIDENCE: OBJECTIONS.** An objection that a question is leading, incompetent, immaterial and irrelevant is not equivalent to an objection that the party is seeking thereby to discredit or impeach his own witness.
3. **Witnesses: IMPEACHMENT.** It is within the discretion of the trial judge to allow counsel to ask a witness called by him, who takes him by surprise by his testimony, whether the witness had not at a prior time made a statement to him contradictory of or inconsistent therewith.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

W. J. Connell, for appellant.

Baldrige & De Bord, contra.

AMES, C.

The petition in this case alleges, in substance, that the defendant was indebted to Johnson & McAllister, a partnership, in the sum of \$680 for goods sold and delivered by the latter to the former, and that on the 21st day of February, 1903, Johnson & McAllister for a valuable consideration assigned the claim in writing to the plaintiff, and that on the same day notice of the assignment was given to the debtor, but that the latter had neglected and refused to pay thereon any further or greater sum than \$404.05, leaving due and unpaid the sum of \$222.75, for which plaintiff prayed judgment. The discrepancy is due to a mistake in computation, which is not in dispute and does not require explanation. The answer admits that at some prior time, not stated, the defendant had been in-

debted to Johnson & McAllister in some unspecified amount, but prior to the making of the "pretended assignment" pleaded in the petition the indebtedness had been fully paid by the defendant to Johnson & McAllister, and that subsequently thereto the defendant had by their direction paid to the plaintiff the sum of \$404.05. Proof of payment was attempted to be made by evidence tending to show that before the defendant had notice of the assignment it had, by the direction and authority of Johnson & McAllister, paid the sum in dispute to and for the use of the latter to certain of their creditors. There is no dispute that at about that time the defendant made payment by such direction to certain of such creditors to the amount stated, but whether before or after receiving notice of the assignment is disputed. The plaintiff had a verdict and judgment, and the defendant appealed.

The evidence is largely circumstantial, and each party contends with equal ardor and sincerity that it is so overwhelmingly in support of his side of the issues as to be practically without conflict. For that reason the plaintiff maintains that the verdict returned is the only one that could be permitted to stand, and for the same reason the defendant insists that the same verdict is wholly without support by the evidence. The arguments are about equally balanced, and there appears to us to be no great preponderance of the evidence on either side, and so the question seems to be one peculiarly within the province of the jury to decide. The examination of the witnesses, which is very long, we do not think it necessary to set out in this opinion. We have made such an examination of the record as to satisfy us that the evidence is conflicting within the meaning of the rule above alluded to. Neither do we feel called upon to set out the instructions, to the giving and refusal of which the defendant excepted. Suffice it to say that none of them appear to us to have been prejudicially misleading or to have been likely to confuse the jury in determining the very simple fact in issue.

Smith, a member of a partnership which was a creditor

of Johnson & McAllister, to which the defendant claims to have made a payment on the day before the date of the assignment, was an unwilling witness for the plaintiff. He testified, among other things, that the payment in question was made by a check which was not presented to the bank on which it was drawn, and cashed, until the 29th day of May, but that he had no recollection and did not know when it was dated or when it was delivered to his firm. But he was the bookkeeper of his firm, and his ledger account book was produced and showed it to have been received on May 28, more than three months after the date of the assignment, and he testified generally that his books were correctly kept. But before this last incident happened he was asked on direct examination if he had not, within 25 minutes previously, stated to counsel for plaintiff that the check was given on May 28. The question was objected to by the following language: "I object to the question, now that it is allowed by the court, as an improper question, as an attempt to entrap his witness making a statement contrary to what he has already made, and for the reason that it is leading, and that no statement or claim has been made by counsel, nor has any foundation been laid, that will permit, authorize or justify the asking of any such question of this witness, and for the further reason that it is incompetent, irrelevant and immaterial." The objection was overruled, and the witness answered: "I think I made that statement to Mr. Baldrige at the recess. That is my recollection." Leading, the question undoubtedly was, but the admission of leading questions is largely within the discretion of the trial court; the fact that they are such affecting only the weight and credibility of the testimony elicited by them. We do not think that in this case the court abused its discretion in this regard. *St. Joseph & G. I. R. Co. v. Hedges*, 44 Neb. 448; *City of Harvard v. Stiles*, 54 Neb. 26; *Schmelling v. State*, 57 Neb. 562. Was it relevant or material that the witness stated out of court that he recol-

lected an alleged fact of which he professed, a few minutes later, when on the witness stand, to have no recollection? Incompetent, in connection with the answer given as affecting the credibility of the witness, it certainly was not, because it is incredible that his memory on the stand would have been a blank concerning a fact that he recollected and related a few minutes before. It was competent, as being such a question as is always treated as such for the purpose of laying the foundation for an impeachment; and such a question is not legally or technically, although it may be strictly, irrelevant or immaterial. The real reason for exclusion, if any, is that it is not such a question as counsel for the plaintiff was entitled to ask his own witness, although he would have had a right under precisely the same circumstances to ask exactly the same question of the same witness, if the latter had been produced and sworn at the instance of the defendant; but that objection, or its equivalent, was not made, and so was waived. But it is by no means certain that even this objection would have been valid, if taken. As a preliminary to the question, the witness was told by counsel that its object was to refresh the recollection of the former, and so undoubtedly the latter would have been bound by the answer, that is, would not have been permitted to dispute the witness had he denied the statement referred to. The authorities do not appear to be quite uniform as respects such a situation, but the weight of them seems to be to the effect that in such circumstances the question is, in the discretion of the trial court, admissible for the purpose of eliciting the truth from a confused or unwilling witness, and in the absence of abuse is not reversible error. *People v. Payne*, 13 Mich. 474; *Dallas C. E. Street R. Co. v. McAllister*, 41 Tex. Civ. App. 131, 90 S. W. 933; *Smith v. State*, 46 Tex. Cr. Rep. 267, 81 S. W. 936; *State v. Cummins*, 76 Ia. 133; 30 Am. & Eng. Ency. Law (2d ed.), 1130-1132, and notes.

We are satisfied that the defendant suffered no prejudice, and that the record is free from other error, and

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recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WILLIAM A. CATE V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1908. No. 15,205.

1. **Criminal Law: CONTINUANCE.** The right of a defendant to continuance on account of the unforeseen and unavoidable absence of his counsel depends largely upon the nature of the case, his diligence, and the inability to procure other counsel in time properly to prepare for the trial, and, unless the discretion of the trial court in refusing the continuance has been abused, a reviewing court will not interfere.
2. ———: **WITNESSES. DISCRETION OF COURT.** Where a number of witnesses have testified to a fact which is not in dispute, the trial court may, in the exercise of a reasonable discretion, limit the number of witnesses testifying in regard to same.
3. ———: **INSTRUCTIONS.** Instructions must be construed together, and, even though a certain portion standing alone may not be technically correct, yet if, taken as a whole, they set forth the law applicable to the issues and the evidence they will be upheld.
4. ———: ———: **INSANITY.** Under the proofs in this case, *held* it was not error for the court to omit to instruct as to the defense of insanity, no instruction having been requested by defendant on that point.

ERROR to the district court for Nuckolls county: LESLIE G. HURD, JUDGE. *Affirmed.*

Halleck F. Rose and Wilmer B. Comstock, for plaintiff in error.

W. T. Thompson, Attorney General, Grant G. Martin, J. T. Dysart and W. F. Buck, contra.

LETTON, J.

At the January, 1907, term of the district court for Nuckolls county the defendant was convicted upon the charge of making an assault upon and stabbing one Lee Gress with intent to wound. From this judgment of conviction he prosecutes error to this court.

The information contained two counts; the first charging stabbing with intent to wound, and the second stabbing with intent to kill. The jury found him guilty of the charge in the first count, and acquitted him of the charge in the second count. The defendant, Dr. William A. Cate, is a practicing physician at Nelson, Nebraska. The complaining witness, Lee Gress, is a farmer residing a few miles from that place. Cate had been the family physician for Gress, and had rendered services in that capacity for which a balance was owing him from Gress. The doctor was about to take a trip for the benefit of his wife's health, and was attempting to collect money due him to produce funds for that purpose. A day or two before the assault Mrs. Gress was in Nelson, and he spoke to her with reference to the account, asking her to give a note for the balance due. On the day of the assault he met Gress upon the street, told him he would like to speak with him, and led the way to the side window of a drug store on the level of the street, where Gress sat upon the window sill and the doctor stood or leaned at the side of the window. According to the witnesses for the state, the doctor asked Gress to pay his account or give a note for it, and when Gress refused to do this he applied an opprobrious epithet to Gress and struck or pushed his fist in Gress' face several times. Gress rose to his feet, threw off his overcoat and a blouse which he was wearing, and, just as this was done, was struck a violent blow with a pocket knife in the hands of the doctor. The knife penetrated his clothing, went through a pocket memorandum book, and entered his body, striking a rib near the region of the heart. He was almost immediately again struck a blow

in the side, which penetrated the pleural cavity. Another blow cut through the front of the cap which he was wearing, and struck about half an inch above and to the right of his eye. Gress, in the meantime, had been trying to strike Cate, but did not succeed until after these wounds were inflicted, when he struck him a severe blow in the mouth, knocking him to the sidewalk. This terminated the affray. There were a number of persons standing nearby. Enoch Gress, a brother of Lee Gress, at the time the quarrel began was standing with some others upon the sidewalk toward the east end of the building. He had a pocket knife in his hand, with which he was figuring on or boring into the wall. When he heard the words applied by the doctor to his brother, he moved toward the combatants, dropping his knife into his pocket as he did so, but before he reached them Cate had been knocked down by Lee. When the doctor was striking Lee Gress with the knife, Gress called out, "Somebody give me a knife," but did not obtain a knife from his brother, and was unarmed during the assault. The evidence of the defendant's witnesses, except that of the defendant himself, as to the essential points, varies but little from that of those of the state, the variance apparently depending largely upon their different points of view of the affray. Dr. Cate testifies that, after he and Gress had had some words, while Gress was sitting in the window, Gress arose and threw off his overcoat; that at that time Enoch Gress came rapidly toward them with a knife; that Lee Gress asked for the knife, and, he thought, got it from Enoch; that Gress then struck him a blow which dazed him; that he then went to fighting, and that he has no recollection or knowledge of having struck Gress with the knife, and that, if he did so, it was done while he was in this dazed condition. Some of the witnesses for the defense say that, after the quarrel began, Enoch went toward Lee, saying, "not to take that off of him"; that Lee then took off his coat, told Enoch to give him his knife, and that the doctor then said, "You will take your knife, will you? I have got a knife too," and the

doctor then took his knife out of his pocket, and the fight began. But on cross-examination no witness testified that Lee Gress ever had a knife, or ever received one from his brother, or that Enoch had a knife in his hand when he reached the point where Lee and the doctor were. From a careful reading of the evidence, we are convinced that it was ample to warrant the jury in coming to the conclusion that the defendant was guilty of a malicious assault upon Lee Gress with intent to wound him.

1. It is contended that the court erred in refusing to continue the case to permit of the attendance of one of defendant's counsel, who resided in Kansas City and who was detained by the sickness of one of his family. The information in this case was filed on March 28, 1905. In November of that year a trial was had at which the jury disagreed. From that time for more than a year the case was pending, and the record does not show the cause of the delay. On November 20, 1906, the case came up for hearing upon the application of the defendant for a continuance, and the case was continued until January 14, 1907. On the 15th of January, on defendant's application, the case was again postponed to January 23 "to allow defendant time to procure counsel to take the place of his attorney G. W. Stubbs," and the sheriff was directed to call 35 talesmen to appear at that time for the trial of the case. The record does not show upon what ground the case was continued from November 20 to January 14, except that it was at the request of the defendant. On the 23d of January he again applied for a continuance, upon the ground that Honorable G. W. Stubbs, of Kansas City, who was his leading counsel, was unable to attend the trial for the following reasons, shown by Judge Stubbs' affidavit, viz.: That his little daughter was taken sick before the 14th of January; that on the 14th the physician in attendance advised him that he might safely leave home; that he reached Nelson on Tuesday morning, the 15th, but was immediately advised that his child was much worse and called back to Kansas City; that her condition is

now such that he cannot at present leave her bedside, but that, if the trial is delayed two or three weeks, he believes he will be able to be present and assist in the trial; that the defendant could not procure other counsel between the time when it was apparent that he could not be present and the date that the case was set for trial, so that such counsel might be of any material value in the trial of the case. This application was overruled, and exception taken. It appears that Mr. H. H. Mauck, counsel for defendant, who tried the case, had been engaged as one of defendant's counsel for a long time; that the probability of Judge Stubbs being unable to attend the trial had been anticipated at the time of the application for the continuance on January 15, and that a week's continuance had been granted, in order to allow defendant to procure other counsel, if necessary. The evidence in the case was simple, consisting mostly of the statements of eye-witnesses to the transaction, and, so far as the examination shows, all the facts bearing upon the question of the defendant's guilt or innocence seem to have been brought out at the trial by Mr. Mauck. It is no doubt true that, if a defendant has been surprised by the unforeseen and unavoidable absence of his counsel, which may result in serious prejudice to him, a new trial may in some cases properly be allowed; but this depends largely upon the nature of the case and the inability to procure other counsel in time for the trial, and, unless the discretion of the trial judge has been abused, a reviewing court will not interfere. The defendant knew that 35 talesmen had been summoned from the body of the county to attend for the trial of his case on the 23d, and that a continuance had been granted so as to allow him to procure other counsel in the event that Judge Stubbs was unable to attend. He apparently took no steps to avail himself of the time allowed him for this purpose, but preferred to take the chances of the little girl improving so that his counsel could attend, or, on the other hand, trying the case with Mr. Mauck, who was fully cognizant of the facts. We think no error was committed

by the trial court in overruling the motion for a further continuance.

2. Error is assigned on the refusal to allow the witness Schaffer to testify. Several witnesses were called by the defendant to testify to the fact that after the occurrence the defendant bore evidence of having received a severe blow upon the mouth, and also that there was an abrasion upon his cheek, apparently for the purpose of contradicting Gress' testimony that he only struck the doctor once during the affray. The record is as follows on this point: "Alma Schaffer is called as a witness by the defendant. Court: Is this witness on the same subject? Mr. Mauck: Yes, sir. Court: You need not call any more witnesses on that point. Defendant excepts." A number of cases have been cited which hold that a court may not arbitrarily determine the number of witnesses to be called upon a given point. As a general principle this may be said to be the law. The principle, however, is subject to many exceptions. Where a number of witnesses are called and have testified to a point that is not disputed, it is unnecessary to take up the time of the court with more of such testimony. The blow on the mouth was admitted, and the fact that there was an abrasion upon the doctor's cheek was not disputed by the state. It is true Gress testified that he only struck one blow, and that that blow knocked the doctor to the ground; but neither he nor any other witness for the state denied or disputed the fact that the doctor's cheek showed an abrasion afterwards. The matter was largely within the reasonable discretion of the trial court, and we think no error was committed; moreover, no offer was made to prove the facts as to which this witness was called to testify.

3. The definition of malice in instruction No. 11 is complained of. Instruction 11 is as follows: "Malice in its legal sense denotes that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. It means any wilful or corrupt intention of the mind; and, as applied to this

case, if you shall be satisfied by all the evidence, beyond a reasonable doubt, that the defendant, without just cause or excuse, committed the offense charged in manner and form as charged in the information, then it was done with malice, or maliciously." This instruction is, in substance, identical with that approved in *Housh v. State*, 43 Neb. 161, and *McVey v. State*, 57 Neb. 471, and we see no reason to change the rule, though we think a better statement would have been "any wilful and corrupt intention of the mind," instead of using the disjunctive. This definition, or one substantially the same, has been adopted by many other courts. See 25 Cyc. 1667, notes 83, 84. The instruction must be read as a whole and considered in connection with the charge in the information, and, thus considered, it is a fair statement of the law applicable to the case.

4. Complaint is made of the giving of the third instruction, and of the supplemental instructions given at the request of the jury. Instructions must be construed together. In instruction 1, section 16 of the criminal code, the violation of which is charged in the information, is set forth, as also is section 17, relating to assault and battery. By instruction 3 the jury were told, in substance, that they may find the defendant guilty of malicious stabbing and cutting with intent to wound, as charged in the first count, or with intent to kill, as charged in the second count, the intent being the only difference in the two counts, or that they might find the defendant guilty of assault and battery. In the supplemental instructions they were told that section 16 is the law on which the information is based in both counts, and that under section 17, if they found the defendant not guilty of the greater charge, they will lawfully find him guilty, if the evidence justifies, of a less grade of the offense, as is explained in instruction 3. We find no error in this.

5. With regard to the complaint with reference to no instruction having been given as to the defense of insanity, we think counsel for the defense were in nowise to blame

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for not requesting an instruction attempting to excuse the assault upon that ground. While it may not have been error to give such instruction, if requested, the proofs can hardly be said to require the court to submit such defense or to warrant the jury in giving it much consideration.

6. It is urged that the court erred in excluding testimony as to the permanent character of the injury to the defendant, caused by the blow on the mouth. While the objection to the question asking Dr. Buffington what the effect of the blow upon Dr. Cate was as to the permanency of the injury was sustained, the witness immediately thereafter testified "that at the point of the depression there was an injury to the spine that remains." The state moved to strike this answer out, but it was permitted to stand. We think the court took the proper view in holding that the permanency of the injury inflicted by the blow upon the mouth had no relevancy to the issue which was being tried, but, even if it had any bearing, the evidence as to its permanent nature was eventually brought before the jury as just stated.

Lastly, it is urged that the evidence is insufficient to justify or excuse conviction of a felony. We have carefully read the entire bill of exceptions, and are forced to come to the conclusion that, however, much to be regretted the consequences to the defendant and to his family may be, the conviction must be sustained. It was apparently by the merest accident that the wounds inflicted on the body of Lee Gress did not reach a vital spot, and the defendant is to be congratulated that the result was not much more serious. The trial court seems to have carefully preserved all the defendant's rights, and we think no prejudicial error is to be found in the record.

The judgment of the district court is

AFFIRMED.

CARL E. CARSON V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1908. No. 15,123.

1. **Criminal Law: PRELIMINARY EXAMINATION: FINDING.** A complaint was filed before an examining magistrate charging plaintiff in error with maliciously killing and destroying 14 certain hogs of the value of \$120, the personal property of a person named in the complaint as the owner thereof. A warrant was issued, plaintiff in error was arrested, and an examination had, in which he was held to appear at the next term of the district court. He gave the required recognizance, and was discharged from custody. In the docket entry of the examining magistrate a history of the case was given, and it was recited that, "after hearing the testimony of the witnesses, and being fully advised in the premises, the court finds that there is probable cause to believe that the defendant is guilty as charged in the complaint. It is therefore considered by me that the defendant give bond in the sum of \$500 for his appearance" at the next term of the district court, etc. *Held*, That this sufficiently showed that the magistrate found that an offense had been committed.
2. ———: **VERDICT: REVIEW.** Upon the trial there was a sharp conflict between the testimony of the witnesses for the state and those on behalf of the defense. If the jury believed the witnesses produced by the state there was sufficient evidence to sustain a verdict finding the accused guilty. They being the sole judges of the weight of the evidence, their finding cannot be molested.
3. ———: **INFORMATION: VARIANCE.** The information charged the malicious killing and destruction of 14 certain hogs of the value of \$120, the offense charged to have been committed on the 5th day of May, 1906. The evidence tended to show that 5 hogs were killed on the 23d day of April, 1906, the value of which was found to be \$44.17, the offense proven being identified as the one charged in the information. *Held*, That the verdict responded to the charge in the information.
4. ———: **EVIDENCE OF VALUE.** There was a conflict in the evidence as to the size and weight of the hogs alleged to have been killed and destroyed. A witness, a dealer in live stock, was called by the prosecution and asked as to the value of the hogs on the date of the alleged offense, specific weights being given in the question and which corresponded with the weights testified to by some of the witnesses. The answer of the witness was given stating the value to be a certain price per hundredweight, leaving the jury to decide as to the weight of the hogs. *Held*, No error.

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5. ———: **MALICE: QUESTION FOR JURY.** The question as to whether the acts charged, if committed, were maliciously done was one of fact for the jury to decide from all the evidence upon that part of the case.
6. ———: **INSTRUCTIONS: REVIEW.** In order to obtain a review of instructions given to a trial jury by the court, it is necessary that the record show that exceptions were taken to the instructions of which complaint is made.

ERROR to the district court for Greeley county: JAMES R. HANNA, JUDGE. *Affirmed.*

J. R. Swain, T. P. Lanigan and George A. Adams, for plaintiff in error.

W. T. Thompson, Attorney General, and Grant G. Martin, contra.

REESE, J.

A complaint was filed before the county judge of Greeley county charging the plaintiff in error with the crime of wilfully, unlawfully and maliciously killing, wounding and destroying 14 hogs of the value of \$120, the personal property of Patrick McManaman. A preliminary examination was had, which resulted in the accused being recognized to the district court. Upon the conclusion of the preliminary examination the county judge made the following entry in his docket: "After hearing the testimony of the witnesses, and being fully advised in the premises, the court finds that there is probable cause to believe the defendant is guilty as charged in the complaint. It is therefore considered by me that the defendant give bond in the sum of \$500 for his appearance in the district court for Greeley county, Nebraska, on the first day of the fall term thereof, to wit, October 22, 1906." Plaintiff in error entered into the required recognizance, and the case was certified to the district court. The county attorney filed his information, whereupon plaintiff in error filed his motion to quash the information, which being overruled, he presented a plea in abatement, to which the county at-

torney demurred. The demurrer was sustained. Plaintiff in error excepted to the ruling in both instances.

The point presented by both the motion to quash and the plea in abatement was that no sufficient preliminary examination had been had, because there was no finding by the county judge that an offense had been committed, no reference to that subject being found in the entry of the decision by him. It is contended by plaintiff in error that such a finding is jurisdictional, that it should be entered in the docket of the examining magistrate, and that in its absence the county attorney had no authority to file the information or prosecute the case. The portion of the statute bearing upon this subject is found in section 302 of the criminal code. It is provided: "If, upon the whole examination, it shall appear that an offense has been committed and there is probable cause to believe that the person charged has committed the offense, the accused shall be committed," etc. In Clark, Criminal Procedure, p. 81, it is said: "In such jurisdictions, where the statute requires the examining justice to hold the accused to answer, when he is satisfied that an offense has been committed, and that there is probable cause to believe the accused guilty, it has been held that the decision of the justice on these points is a judicial determination necessary to the jurisdiction of the higher court, and that an information filed in the higher court before any return has been made, showing such a decision by the justice, should be quashed, and this, notwithstanding a proper return is made pending the motion to quash"—citing *People v. Evans*, 72 Mich. 367. In the case cited it is said: "The statute requires the justice, after 'an examination of the whole matter,' to come to an opinion as to whether or not an offense has been committed; and, if of opinion that there has been, then as to whether there is probable cause to believe the accused guilty thereof, and thereupon to discharge or hold him to answer according to the conclusion reached; and it is only when the conclusion reached by the justice, after an examination of the whole matter,

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is that an offense has been committed, and that there is probable cause to believe the accused guilty thereof, and so certified to the circuit court, that an information may be filed. This conclusion or opinion of the justice is a judicial determination, and the basis of the right to proceed in the circuit court by filing information"—citing *People v. Annis*, 13 Mich. 511; *Turner v. People*, 33 Mich. 363; and *Yaner v. People*, 34 Mich. 286.

We have been unable to see that the case of *People v. Annis*, *supra*, touches the question involved; but in *Turner v. People*, *supra*, the decision is the other way, the holding being that it is not necessary for the examining magistrate to state his findings in his docket, the court saying: "But no record of a specific finding one way or the other is required to be kept or certified to the circuit court." In the latter case (*Yaner v. People*) the precise question is not decided, yet the logic of the case seems to support the text in Clark.

The contention of the attorney general is that the entry of the county judge that "the court finds that there is probable cause to believe that the defendant is guilty as charged in the complaint" is a sufficient finding that the offense has been committed, and that all the requirements of the statute have been met. This was probably the view taken by the district court. We are not aware of any decision having been made upon the precise point by this court, and therefore have no aid from previous expressions of the court. We are of the opinion that, if the statute requires such entry to be made in the magistrate's docket, the entry is sufficient to give the district court jurisdiction. The entry is substantially a copy of the form given in Maxwell, Criminal Procedure, p. 16, except that the name of the accused is not here used; the form being: "On consideration whereof I find that there is probable cause to believe that C D committed the offense charged in said complaint." It is true that before an accused can be legally held to answer a criminal charge upon information he is entitled to a preliminary examination, and there must

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be proof and a judicial determination that an offense had been committed and that there was probable cause to believe the defendant guilty as charged in the complaint. But that does not conclusively argue that it is necessary, in the absence of a statute requiring it, that these findings should be entered, technically, or at all, upon the docket. Jurisdiction having been obtained, the preliminary examination had, and the accused recognized to the district court would probably be enough to be shown by the record to confer jurisdiction upon the prosecuting attorney to file the information and upon the district court to try the accused.

A jury trial was had in the district court, which resulted in a verdict finding plaintiff in error guilty as charged in the information, and finding the value of the hogs killed to be \$44.17. A motion for a new trial was filed and overruled, and plaintiff in error was sentenced to imprisonment for 15 months in the penitentiary. From that judgment he prosecutes error to this court. The petition in error is of great length, but few of the assigned errors are discussed in the briefs upon which the case is submitted. All others will be considered as waived, and will not be noticed.

It is first insisted that the evidence was not sufficient to sustain the verdict. This contention is based largely upon the fact that there was a sharp conflict in the testimony of the witnesses, and that some of the witnesses produced by the state were unworthy of belief, and that in some instances their testimony was self-contradictory. We have carefully read the bill of exceptions, and find that in some particulars the contention of plaintiff in error is well founded. Indeed, were the question of plaintiff in error's guilt to be passed upon by us, sitting as a trier of fact, we might hesitate to hold that the guilt of plaintiff in error had been established beyond a reasonable doubt; but that question was submitted to and passed upon by the jury. The witnesses were before the jurors, their conduct and demeanor were observed by them, and their

apparent truthfulness was for the jury to consider, they being the sole judges of the weight to be given to the testimony of each witness. If they believed the statements of the principal witnesses for the state, as they must have done in order to find the verdict of guilty, the verdict must be held to be conclusive.

It is contended that the verdict does not respond to the charge in the information, as the information charges the killing of 14 hogs on the 5th day of May, 1906, and all the evidence submitted relates to the killing of hogs on the 23d day of April of the same year, and the proof showed but 5 hogs killed on that date. It is well settled in this and other courts that the precise date upon which an offense is committed is not a material matter, subject to two conditions: That the offense must have been alleged and proved to have been committed within the time within which a prosecution may be had, and that the offense proved must be identified as the one charged. This case seems to have been brought within these rules. The fact that the jury found that 5 hogs were killed instead of 14, as charged, and the value to be \$44.17 instead of \$120, as charged, is not a matter of which plaintiff in error can complain.

It is contended that the district court erred in permitting a witness, who was a dealer in live stock and had knowledge as to the values in the market at the time the crime was said to have been committed, to testify as to the value of hogs of a certain weight at that time; the contention being that the weights named in the question were not based upon the evidence adduced at the trial. While we think that there was not a material departure from the testimony of the witnesses as to the quality and weight of the hogs, yet we observe that the answer of the witness was that "they would be worth on the market that day" about \$5.70 a hundred pounds. This left to the jury the question as to what the weights were, with a price per hundred, to be used as a basis for ascertaining the value of the property. The answer of the witness was

responsive to the question as framed, and we cannot see that the court erred in allowing the witness to answer. The fact that the jury found the value to be the sum fixed by the witness in computing 775 pounds at \$5.70 a hundred, or \$44.17, seems to indicate that they found the weight to be as stated in the question.

It is next claimed that the evidence failed to show that plaintiff in error entertained any malice as against the owner of the property at the time it is said he shot and killed the hogs. This was a question for the jury. To say nothing of the mere fact of killing the stock, if done wantonly, being proof of malice, if the jury believed the testimony of the witness Bolden, who claimed and testified that he witnessed the killing, as they must have done in order to return the verdict of guilty, the declarations of the plaintiff in error at the time of the killing were sufficient to show personal malice against the owner. The testimony of this witness, briefly stated, was to the effect that the stock killed were trespassing on the farm of one Mrs. Lamb, for whom plaintiff in error was working in repairing a fence; that plaintiff in error and Bolden went to where the hogs were, and that plaintiff in error began shooting them, and at the same time making threats against the owner, should he object or retaliate. This, if true, would be sufficient proof of malice.

Instructions numbered 8, 10 and 18 are sharply criticised by counsel for plaintiff in error. These instructions were given by the court upon its own motion, and none of them was excepted to, and therefore we cannot, properly, consider them. However, we have examined them, and cannot see that they misstated the law.

Finding no reversible error in the record of which complaint is made, it follows that the judgment of the district court must be, and is,

AFFIRMED.

MARY A. TRAINOR ET AL., APPELLANTS, v. MAVERICK LOAN
& TRUST COMPANY, APPELLEE.

FILED FEBRUARY 6, 1908. No. 15,002.

1. **Constitutional Law: TAXATION.** An act for levying taxes and providing the means of enforcement is within the unquestionable power of the legislature.
2. **Due process of law** does not necessarily require a judicial hearing in matters of taxation.

APPEAL from the district court for Box Butte county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

William Mitchell, for appellants.

C. Patterson, contra.

DUFFIE, C.

The plaintiffs are the only heirs at law of William Trainor, deceased. The deceased was the owner of the northeast quarter of section 34, township 25, of range 47, in Box Butte county, Nebraska. The taxes assessed against said land for the year 1902 were not paid, and the defendant at the regular tax sale, held November 2, 1903, purchased the same for the delinquent taxes thereon. Due notice of the expiration of the time to redeem was given by the defendant, and the parties interested in the estate failed to redeem from the tax sale. The treasurer of Box Butte county, upon the surrender of the tax sale certificate, made a deed to the defendant for the said premises, under which it claims to be the owner of the land. In their petition the plaintiffs allege the foregoing facts, and further state that prior to the commencement of this action they tendered to the defendant the full amount of the taxes for which the land was sold, together with the subsequent taxes paid thereon, with interest and costs, and that they made a like tender to the treasurer of Box Butte county; that the defendant refused to recognize the right of the plaintiffs to redeem from the tax sale, whereupon

they brought this action asking that the tax deed be canceled and set aside upon the payment to the defendant of such amount as the court may find it entitled to receive on account of its purchase of the premises and of subsequent taxes paid thereon. A demurrer to this petition was interposed by the defendant and sustained by the trial court. Plaintiffs elected to stand on their petition, and the court thereupon entered judgment dismissing the petition and awarding costs to the defendant. The appeal is taken from this judgment.

Plaintiffs do not complain of any illegality in the tax for which the land was sold, nor of any irregularity in the sale, or of the proceedings leading up to the making of the tax deed. The complaint is that a sale of real estate made by the treasurer of the county, for delinquent taxes, in the absence of some proceeding in court is unconstitutional and void; that it is an attempt on the part of the legislature to deprive the plaintiffs of their property without due process of law. It has never been held that the state may not adopt summary or even stringent measures for the collection of taxes, so long as they are administrative in their character, and it was never held that such proceedings are open to the objection that they divest the citizen of his property without due process of law. While one is to be protected in his interests by the "law of the land," and to have the judgment of his peers in those cases in which it has immemorially existed, or in which it has been expressly given by law, there is no decision to be found that it is necessary for judicial action in every case for which the property of the citizen may be taken for the public use. On the contrary, a legislative act for that purpose, when clearly within the limits of legislative authority, is of itself of the law of the land. *Spencer v. Merchant*, 125 U. S. 345. An act for levying taxes and providing the means of enforcement is within the unquestioned and unquestionable power of the legislature. *Kelly v. Pittsburg*, 104 U. S. 78. Due process of law does not necessarily require a judicial hearing in matters of taxa-

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tion. *State v. Sponaugle*, 45 W. Va. 415. "The existence of government depending on the prompt and regular collection of revenue must, as an object of primary importance, be insured in such a way as the wisdom of the legislature may prescribe." Cooley, *Taxation* (3d. ed.), 54; *Leigh v. Green*, 64 Neb. 533, 193 U. S. 79; *Woodrough v. Douglas County*, 71 Neb. 354. The fact that the taxes for which the land was sold were levied under the law in force in 1902, and that the sale was had under the provisions of the revenue law enacted in 1903, cannot inure to the plaintiffs' advantage, as section 242 of the later act (Comp. St., ch. 77, art. I) reserves to the state and to all parties every right accruing to them under the law in force prior to the enactment of the last mentioned act.

The district court did not err in sustaining the demurrer to plaintiffs' petition, and we recommend an affirmance of the judgment appealed from.

EPPELSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE, EX REL. JOHN W. McDONALD, APPELLANT, v. J. C. FARRINGTON ET AL., APPELLEES.

FILED FEBRUARY 6, 1908. No. 15,298.

1. **County Board: ALLOWANCE OF CLAIMS.** The allowance by the board of county commissioners of a claim against the county, there being no money in the treasury at the time, and no tax levy against which a warrant can be drawn, while it may be irregular, is not in excess of the power given the board to examine and settle all claims against the county.
2. ———: ———: **LIMITATIONS.** The duty of the board of county commissioners to provide for the payment of all allowed claims, where such allowance is not absolutely void, is a continuing duty against which the statute of limitations is no defense.

APPEAL from the district court for Dawes county:
JAMES J. HARRINGTON, JUDGE. *Reversed with directions.*

S. L. Geisthardt and Roscoe Pound, for appellant.

Albert W. Crites and J. E. Porter, contra.

DUFFIE, C.

The plaintiff asks a writ of mandamus commanding the defendants, three of whom are the county commissioners of Dawes county, and the fourth, the clerk of said county, to revise their estimates and levy for the year 1904, and to include in their estimates and levy of taxes an amount sufficient to pay the claims of the relator against the county, together with interest thereon, not exceeding in the aggregate the amount limited by law for such estimates and levy. A demurrer was interposed to this petition and submitted to the district court for Dawes county on April 24, 1905, and was by the court held under advisement until January 10, 1907, when the decision of the judge presiding at the hearing was, at his request, announced by the Honorable W. H. Westover, also a judge of that court, and judgment was entered dismissing the petition. Plaintiff has appealed.

It is shown in the petition, and admitted by the demurrer, that during the years 1892 and 1893 the county of Dawes became indebted to various persons on account of salaries and office expenses of county officers, witness fees, court costs in county and state cases, supplies furnished to the county, taking care of paupers, repairing county property, and the like. There is no claim that this indebtedness was not honestly incurred for actual services rendered, and supplies furnished; indeed, it is freely admitted by the county that the claims were all legally incurred, and constitute a moral obligation against the county. At various sessions of the board of county commissioners during the years 1892 and 1893 all the claims referred to in the petition were presented to the county board, examined

and allowed, and warrants were issued and delivered to the holders of these claims. The warrants were in the ordinary form, showing on their face the purported amount of the levy for the fund on which drawn, and the amount already drawn on such fund, which in each instance was less than 85 per cent. of the amount of the funds as shown on the face of the warrant. These warrants were subsequently sold, and after passing through one or more hands became the property of the National Life Insurance Company, of Montpelier, Vermont, and this company continued to hold them until some time during the year 1903, when it transferred them to the relator, who had become liable for their payment under a guarantee made to the insurance company at the time it purchased them. The warrants were all registered for nonpayment, and have never been paid. The county board of Dawes county has made several ineffectual efforts to provide for their payment. At a regular session of the board for making estimates for the year 1896 an estimate in the sum of \$4,500 was made to pay outstanding warrants, including those in question, and a tax was levied for their payment. The county board further transferred to the general fund money in the hands of the treasurer to the credit of the bridge and other funds, in which there was a surplus, for the purpose of retiring these warrants. The tax levy made in 1896 was enjoined by the Grand Island & Wyoming Central Railroad Company. On appeal taken to this court from the judgment of the district court enjoining such levy, the judgment of the district court was affirmed. *Grand Island & W. C. R. Co. v. Dawes County*, 62 Neb. 44. After this the National Life Insurance Company, in the year 1899, brought suit against the county on these and other warrants, and in that action the district court adjudged that the warrants here in controversy were void, because prior warrants had been issued against the funds on which drawn in excess of 85 per cent. of the levy. This judgment was affirmed by this court January 7, 1903. *National Life Ins. Co. v. Dawes County*, 67 Neb. 40. After the decision in the case

last mentioned, and before the meeting of the board for making the annual estimates for the expenses for the year 1904, the relator made a demand upon the board that it include in the estimate for expenses for that year an amount sufficient to pay the claims represented by these illegal warrants, and to make a levy to raise a fund to pay such claims. A further demand was made upon the board prior to the annual levy for 1904 to raise a fund on which valid warrants might be drawn to pay these claims. The board refused to comply with either of these demands. The petition further recites that on January 30, 1904, there was cash in the general fund of Dawes county in the sum of \$1,170.85, and that at all times since there has been in the general fund an amount sufficient to pay a portion of the relator's claims; that the assessed valuation of all the property in the county was sufficient to enable the county board to make a levy to pay all the expenses of the county, and in addition an amount sufficient to pay the claims of the relator.

In support of the judgment of the district court the defendant makes two contentions: First, that there has never been any valid allowance of the claims held by the relator, because when said claims were allowed there were no unexpended funds against which warrants might be drawn; and, second, that the relator's cause of action is barred by the statutes of limitations. If the allowance of these claims made by the county board in 1892 and 1893 was valid, then they stand as a liability against the county in the nature of a judgment. It was held in *Taylor v. Davey*, 55 Neb. 153: "An order of a county board allowing or rejecting claims against the county has the force and effect of a judgment, and is conclusive unless vacated or reversed on appeal." This being so, the duty of the county to provide for the payment of a judgment is a continuing duty against which the statute of limitations could not operate. The material question then is: Did the county board of Dawes county have jurisdiction to audit and allow these claims at the time they were audited and allowed;

there being no money in the fund out of which the claims were to be paid against which a warrant might be drawn? In *Lancaster County v. State*, 13 Neb. 523, this court refused to issue a mandamus directing the commissioners of Lancaster county to audit a claim where no estimate had been made for taxes to be levied to pay the same, and where there were no funds in the treasury for its immediate payment. The court, after examining the several sections of our statute relating to the allowance of claims against the county, said: "A fair construction of these provisions shows that the legislature did not intend that a claim should be allowed until a warrant could be drawn for the payment of the same; in other words, unless there are funds in the treasury or a tax levied upon which a warrant can be drawn. As it clearly appears that there are no funds in the treasury, or taxes levied upon which a warrant can be drawn to pay the relator's claim, the commissioners will not be compelled to audit his account." In the later case of *State v. Cather*, 22 Neb. 792, the relator applied for a writ of mandamus to require the respondents to include in their estimate for taxes and to levy a tax to pay a claim which he held against the county, and which had been allowed by the county commissioners a long time prior thereto. One of the defenses made by the answer was that the pretended allowance was not in law an allowance or judgment, as there were at the time no funds of Webster county against which warrants might or could be drawn in payment thereof, and no money in the county treasury out of which the allowed claims might be paid. It was held that this did not constitute a defense. How are these two seemingly conflicting opinions to be reconciled? It can be done only upon the theory that the allowance of a claim at a time when a tax has not been levied for its payment, and when there is no money in the treasury against which a warrant might be drawn, is not a void action on the part of the county commissioners, but is merely an irregularity or erroneous proceeding had by them. That this is the true rule to apply clearly appears,

we think, from an examination of the statutes, and from later expressions by the court. Section 23, art. I, ch. 18, Comp. St. 1897, defines the powers of the county board. Among other powers conferred by this section are the following: "To manage the county funds and county business, except as otherwise specifically provided, * * * to examine and settle all accounts against the county, and all accounts concerning the receipts and expenditures of the county." Section 33 of said chapter provides that, "upon the allowance of any claim or account against the county, the county board shall direct the county clerk to draw a warrant upon the county treasurer in payment thereof," etc. In the case of *Perkins County v. Keith County*, 58 Neb. 323, this court had occasion to examine and construe section 23 in connection with section 37 of chapter 18, and said: "It is entirely clear that section 37 is not a grant of power to the county board, but rather a provision regulating the exercise of the power granted in section 23." In *State v. County Commissioners of Cass County*, 60 Neb. 566, it was claimed that the board had no jurisdiction to audit and allow an unverified account. In the twelfth paragraph of the syllabus it is said: "Section 37 regulates the grant of power and mode of procedure in the allowance of claims against the county, and the failure to observe its provisions does not deprive the commissioners of a county of jurisdiction to act upon claims against the county." In this case the provisions of section 33, directing that a warrant may issue upon an allowed claim without any mandatory direction that it shall issue immediately, cannot, we think, be held either to take away or limit the jurisdiction conferred upon the board of county commissioners by section 23 "to examine and settle all claims against the county," and must be regarded as a provision regulating their proceedings in the exercise of the power conferred. The board of commissioners having charge of county affairs at the time when services are rendered, or supplies furnished, are best qualified to pass upon the legality of the claim and the amount due thereon.

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In making the estimate of the necessary expenses of the county, we are at a loss to understand how they can proceed with any degree of certainty until it is known for what claims they will have to provide, as the amount of such claims cannot be known until they have been examined and passed on by the county board. The allowance of the claims now held by the relator may have been irregular, but the action of the county board in that respect was not void. The allowed claims stand in the character of a judgment against the county, imposing on it a continuing duty to make payment.

We recommend a reversal of the judgment of the district court and remanding the cause, with directions to that court to issue the writ as prayed.

EPPELSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded to the district court, with directions to issue the writ as prayed.

REVERSED.

CARL KOFOID, APPELLEE, V. LINCOLN IMPLEMENT & TRANSFER COMPANY, APPELLANT.

FILED FEBRUARY 6, 1908. No. 15,065.

1. Statute of Frauds: PAROL LEASE: DIRECTING VERDICT. Where, in an action of forcible detainer, it appears that the defendant claims possession solely under a parol lease for a longer period than one year from the making thereof, it is proper for the court to direct a verdict for the plaintiff.
2. Justice of the Peace: APPEAL: PLEADING: AMENDMENT. The original pleadings in an action pending in the district court on appeal from an inferior court may be amended for the purpose of correcting a clerical error.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

T. J. Doyle, for appellant.

Burkett, Wilson & Brown, contra.

EPPERSON, C.

This is an action of forcible entry and detainer instituted in Lancaster county before a justice of the peace, from whose decision an appeal was prosecuted to the district court, where the plaintiff prevailed upon an instructed verdict. Defendant appeals to this court.

Plaintiff purchased the property in controversy about January 1, 1906, at which time defendant was in possession as tenant under a written lease from plaintiff's grantor. This lease was for one year, ending March 1, 1906, and was assigned to the plaintiff when he purchased the premises. Upon the expiration of the written lease plaintiff served a preliminary notice to vacate, and later instituted this action.

It is contended by defendant that at the time plaintiff bought the property the parties hereto entered into a verbal contract whereby plaintiff leased said premises to the defendant for one year. Plaintiff denies making such agreement, but in our consideration of this issue we assume that plaintiff did by parol agree to lease said premises to the defendant for one year. The controlling fact to be ascertained is the date on which such tenancy was to begin. The defendant's evidence does not fix the time for the beginning of this term. The witnesses, testifying to that fact, say no more than that it was to be for one year. In view of the fact that the written lease was then in force, and there being no evidence that the parties agreed to discontinue it and to substitute a verbal contract therefor, we are bound to conclude that the period of time provided for by the verbal agreement was to begin upon the expiration of the written lease. Another fact clearly indicating that the parties did not intend that the verbal lease should begin at the time it was made is that the same was made prior to the plaintiff's purchase of the property.

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The tenancy under the verbal lease beginning at a subsequent time, the contract is void under section 5954, Ann. St. 1903, which provides: "Every contract for the leasing for a longer period than one year from the making thereof, * * * shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made." See *Thostesen v. Dorsee*, 77 Neb. 536.

The bill of particulars, filed in the justice of the peace court, contained an allegation that the said lease "came to an end with the last day of March, 1906." Before trial in the district court the plaintiff was permitted to amend it by inserting the word "first" instead of the word "last" appearing in the above quotation. The defendant objected to the amendment, because it was changing the pleadings and issues upon which the case was tried in the justice of the peace court. The bill of particulars clearly sets forth the terms of the lease, and it is apparent that the issue determined in the justice of the peace court was based upon the rights of the parties as they existed upon the termination of the lease—March 1. This issue was not changed by the amendment. Again, as stated by the trial court, the amendment was simply the correction of a clerical error, and was not prejudicial to the defendant. As we understand the rule, a pleading may be amended in the appellate court where the issues are not changed, and such amendment is the correction of a clerical error.

We recommend that the judgment of the district court be affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARTHA J. SHOEMAKER, APPELLANT, v. COMMERCIAL UNION
ASSURANCE COMPANY, APPELLEE.

FILED FEBRUARY 6, 1908. No. 15,319.

1. **Insurance Contract: EVIDENCE.** In an action upon an alleged insurance contract, plaintiff introduced evidence that defendant's agents sent to plaintiff a claim for the payment of the premium for the alleged insurance, as follows: "Martha J. Shoemaker, To Crutcher & Welsh (defendant's agents) Dr. To insurance premium advanced on policy No. — of Commercial Union Assurance Company, held as collateral to loan No. 038701, * * * \$14.40. If this amount is promptly remitted, the policy will be filed with the receivers of the Lombard Investment Company for the benefit of the present owner of the mortgage. If not paid, the receivers will call on the mortgage holder for payment, and this amount will be held by him as a lien against the property." *Held*, Insufficient to establish the consummation of an insurance contract.
2. ———: ———. Plaintiff, a mortgagor, agreed to maintain insurance upon the mortgaged dwelling-house for the benefit of the mortgagee. Upon the expiration of an insurance policy the receivers of the mortgage demanded the payment of a premium for the reinsurance of the property, and agents of the defendant company made the demand set forth in the preceding paragraph, and plaintiff introduced evidence that she had paid the premium to an agent of the receivers, but who is not shown to be the agent of the defendant company, and it is not shown that the premium paid ever reached the defendant or its agents, or that the plaintiff was directed to pay the same to the receiver's agent. *Held*, Insufficient of itself to prove a contract for insurance.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed*.

Walter J. Lamb and George A. Adams, for appellant.

Field, Ricketts & Ricketts and Sylvester G. Williams, contra.

EPPERSON, C.

On a former appeal a judgment in favor of the plaintiff was reversed and the case remanded for further proceed-

ings. 75 Neb. 587. When the case reached the district court the plaintiff filed an amended petition, alleging that on or about January, 1895, the defendant, in consideration of the sum of a premium of \$14.40, agreed with the plaintiff and with her agents to insure, and did insure, her dwelling-house in the city of Lincoln against loss or damage by fire to the amount of \$1,200 from November 30, 1894, to November 30, 1897, and agreed to issue to plaintiff its policy for such insurance, but never delivered the same to plaintiff and still refuses to do so. The amended petition further alleges that at the time of making the agreement to insure the property there was an outstanding mortgage thereon, given by the plaintiff to the Lombard Investment Company, for \$1,100; that for further security the mortgagee held an insurance policy in the Orient Insurance Company to the amount of \$1,200, expiring November 30, 1894, which had been taken out by the plaintiff, and that the mortgage contained an express stipulation between the parties making the Lombard Investment Company her attorney in fact to reinsure upon the expiration of the existing policy, and authorizing the Lombard company, upon insuring or renewing the insurance, to add the amount of the premium to the amount of the mortgage loan so held by it. It is further stated that the agreement between the plaintiff and the defendant to insure plaintiff's dwelling-house was made in connection with an agreement for the extension of the maturing unpaid loan thereon for \$1,100. It is further alleged that prior to the making of the agreement to insure, entered into between the plaintiff and defendant, the defendant company entered into an agreement with the Lombard Investment Company to the effect that it would insure, and that it should have the right to insure, all the property upon which the Lombard company accepted or negotiated loans in Missouri or Nebraska and other western states; that the Lombard company consented to collect, or assist in collecting, the premiums for such insurance, and where not collected to pay the same and add the amount of the premium to such

loans, respectively; that in order to carry out this agreement between the defendant company and the Lombard company the defendant company commissioned one E. R. Crutcher, of Kansas City, Missouri, its agent; that Crutcher, at the same time, was general agent of the Lombard company, having sole supervision and control over all insurance business of the Lombard company, and that notice was given by defendant and the Lombard company that it would not accept or renew any loans, except upon the express condition that insurance upon the property upon which a loan was made should be effected in the defendant company; that shortly prior to the making of the agreement of insurance the Lombard company failed and went into the hands of receivers, and that the receivers appointed for that company, by agreement with the defendant company, continued the agreement existing between it and the Lombard Investment Company previous to its failure; that in order to consummate and carry out such agreement the defendant company thereafter acted in conjunction with the Concordia Loan & Trust Company, which was a defunct corporation owned by the Lombard company, and which was revived in name alone to carry on the business of the renewal or extension of loans held or taken by the Lombard company in connection with insurance in the defendant company and renewals of insurance, and that it was expressly agreed that no renewals of loans made by the Lombard company should be accepted, except when accompanied by an agreement that the applicant for such renewal should take out or renew its insurance in the defendant company through its agents, Crutcher & Welsh, at Kansas City, and that all notices in any way relating to the insurance connected with such loans or renewals were to be printed and prepared by the defendant company, and by its agents forwarded through the Concordia Loan & Trust Company. It is alleged that about October, 1894, plaintiff applied to one H. B. Sawyer, whom she alleges was then agent for the Lombard company and

for the Concordia Loan & Trust Company, and also for the defendant insurance company, for an extension of her loan of \$1,100; that an agreement of extension of her loan was negotiated, and that she signed an application therefor; that at that time the Lombard Investment Company and the Concordia Loan & Trust Company, through the said H. B. Sawyer, required of the plaintiff that she take out an insurance policy in the defendant company for \$1,200 for three years at a premium of \$14.40, to date from November 30, 1894, to which she agreed; that this renewal application was sent to the defendant's office in Kansas City, which was also occupied by the Lombard Investment Company and its receivers and the Concordia Loan & Trust Company; that the same was accepted and its terms approved, and the defendant assumed, agreed and undertook to renew the said policy for \$1,200 for three years from November 30, 1894, of which it gave the plaintiff and its agents due notice; and that afterwards, on or about the 30th of November, 1894, defendant agreed to insure, and did insure, plaintiff's property in the sum of \$1,200, of which it gave plaintiff and her agent due notice. Other matters are alleged showing a waiver of the prompt payment of the premium, which was paid to H. B. Sawyer in January, 1895, and a bill for the same, it is alleged, was sent by the defendant to said Shoemaker for collection. The house was destroyed by fire April 24, 1895, and recovery is sought upon the agreement to insure. Upon the conclusion of the plaintiff's evidence, the trial court directed a verdict for defendant.

Much stress is placed by the plaintiff upon what is termed the "insurance clause" in the mortgage given to the Lombard company. That clause provided that plaintiff should insure the property for its insurable value, payable to the mortgagee, in some company approved by the Lombard company or assigns. In the event of the failure to do so, or to reinsure and assign the policy to the Lombard company before noon of the day on which the insurance expired, then the Lombard company was

authorized and empowered, as attorney in fact for the party of the first part, to insure or reinsure said building in such company as it might select. It was further provided that, in case the Lombard company insured or re-insured the property upon which its loan was made, interest should be allowed upon the premium paid by the Lombard company at the rate of 10 per cent. per annum, and the mortgage stand as security for the repayment thereof, and that the mortgage might be foreclosed if the money so advanced was not repaid within 30 days. Prior to going into the hands of receivers the Lombard company maintained an insurance department, of which one E. R. Crutcher was the head. After the receivers took possession of the assets of the Lombard company a circular letter, signed by the receivers, was issued and sent to the parties having loans from the company; Mrs. Shoemaker, among others, receiving a copy. This letter was dated October 1, 1894, and called attention to the early expiration of the old policy. It expressed dissatisfaction, experienced by the receivers in having mortgagors place insurance with various companies, and stated that the Lombard company had the insurance in which it was interested placed with the Commercial Union Assurance Company, and perfected arrangements with Crutcher to renew all policies, including that referred to above. It further stated: "The receivers cannot carry this insurance or make any advances for premiums, yet they deem it advisable to give gratuitously this notice of expiring insurance that all interests may be protected. To this end * * * we have arranged with him (Crutcher) to look after insurance whenever requested by any one interested in loans made by the Lombard Investment Company." This letter-head bears the names of the receivers of the Lombard company, and also of Crutcher & Welsh, insurance agents. The testimony discloses that after the receivership Crutcher formed a partnership with Welsh, for the purpose of carrying on the insurance busi-

ness. While at the head of the insurance department of the Lombard company he was commissioned as agent of the Commercial Union Assurance Company, defendant herein, and he retained said commission and acted as agent for the defendant company after associating himself with Mr. Welsh.

The Concordia Loan & Trust Company, as explained by one of plaintiff's witnesses, was originally a subcompany of the Lombard Investment Company, and was organized especially for the purpose of buying in taxes on defaulted loans and holding tax certificates. At the failure of the Lombard company it was discovered that the Concordia Loan & Trust Company was solvent, and it was used as a means of holding the business together, and the holders of those loans of the Lombard company which had been sold in the east were solicited to place their loans in the hands of the Concordia Loan & Trust Company for adjustment and settlement. Many of them did so. The witness further explained that a number of the parties holding loans purchased from the Lombard company preferred to use the receivers of that company in the adjustment of their claims, and the receivers for two or three years attended to their business. The loan of one party would be looked after by the Concordia Loan & Trust Company, and of another party by the receivers of the Lombard company; but both the receivers and the Concordia company had the same clerks and occupied the same offices. The guaranty of the Lombard company was indorsed on all of the loans which it had sold, and the receivers felt it their duty to do whatever they could for the investors to realize their money with a view to reducing the liability on the guaranty. This, it is explained, was the reason for the receivers handling a great many of these loans; but, where the investors were willing, then the receivers placed them in the hands of the Concordia Loan & Trust Company. It is undoubtedly true that the receivers and Crutcher & Welsh were anxious that any reinsurance effected on property on which loans were held

should be taken out in the defendant company. The reason for this is plain, and is explained in the letter of the receivers. Crutcher was undoubtedly anxious to write insurance in the company for which he was agent, on account of the commissions that would accrue therefrom, and, having been at the head of the insurance department of the Lombard company while it was a going concern, he had a better knowledge of the condition of the insurance existing upon property upon which loans had been effected than any other party, and the receivers allowed him access to the books of the company, and undoubtedly afforded him every opportunity in their power to secure reinsurance where policies had expired.

Under date of January 5, 1895, Crutcher & Welsh sent to Mrs. Shoemaker the following: "Kansas City, Mo., Jan. 5, 1895. Martha J. Shoemaker, 2209 So. 13th St., Lincoln. To Crutcher & Welsh, Dr. 11-30-'94. To insurance premium advanced on policy No. . . . of Commercial Union Assurance Company, held as collateral to loan No. 038701. Sum insured is \$1,200. Rate \$1.20. Term 3 yrs. \$14.40. If this amount is promptly remitted, the policy will be filed with the receivers of the Lombard Investment Company for the benefit of the present owner of the mortgage. If not paid, the receivers will call on the mortgage holder for payment, and the amount will be held by him as a lien against the property."

The mortgage referred to in this communication was one which the plaintiff had given on the property in question to the Lombard Investment Company, and by it transferred to Mrs. Longacre. As said by Judge ALBERT in his opinion on a former appeal of this case: "The letter is ineffective either to prove the fact of payment of the premium or an offer on the part of the defendant to insure the property. If the letter be treated as that of the company, at most it shows a waiver of payment of the premium as a condition precedent to the contract of insurance becoming effective." 75 Neb. 587. Plaintiff claims that she paid the premium to H. B. Sawyer, de-

fendant's agent, at Lincoln. In this connection it might be stated that the terms upon which a renewal of Mrs. Shoemaker's loan was agreed upon were that \$100 upon her loan should be paid in cash and the remainder of \$1,000 should be extended for a period of three years. Mrs. Longacre, the holder of her loan, had placed the mortgage in the hands of the Concordia Loan & Trust Company. She had made one payment of \$50 of the \$100 agreed upon, and subsequently, at another time, paid \$25 to H. B. Sawyer, who was without doubt acting as agent for the Concordia company. Of this latter sum it is now claimed \$14.40 was to be applied in payment of the premium upon renewal of the insurance; but we have searched the record in vain for any evidence which goes to show that the Concordia Loan & Trust Company was either the agent of the defendant company, or that it had effected insurance upon the plaintiff's property through that company or had made any arrangement or agreement for such insurance. Neither can we discover that H. B. Sawyer, to whom the money was paid by the plaintiff, had any connection whatever with the defendant company, or was in anywise authorized to act for it or in its behalf, nor does it appear that he or the Concordia company ever paid the premium to the defendant or to Crutcher. Again, it might be stated that, while the terms for the extension of Mrs. Shoemaker's loan had been agreed upon, the evidence is clear that she on her part never complied with the conditions of such extension by paying to the holder of her mortgage all of the \$100 in cash which was made a condition of such extension. The receivers, as in duty bound, in order to protect the estate in their hands, offered Crutcher & Welsh and the Concordia Loan & Trust Company every opportunity at their command to effect reinsurance upon loans which had been sold to outside parties, in order to save liability on the guaranty which the Lombard company was under for the payment of such loans in case of loss by fire of the mortgaged property. This being the case, it is not at all strange that they

offered the services of their clerks to the Concordia company in its efforts to collect loans which had matured and to effect reinsurance where policies had expired. This probably explains a letter written by a clerk in the office of the receivers of the Lombard company upon a letterhead of the Concordia Loan & Trust Company calling for the deferred cash payment of \$25 agreed upon for an extension of the loan, and \$14.40 as premium upon reinsurance of the property, and also a letter of one Adams, purporting to be acting for the Concordia Loan & Trust Company, calling for payment of the premium for reinsurance of plaintiff's property. Mr. Crutcher, the agent of the defendant company, is explicit in his testimony that no policy of reinsurance upon the property of Mrs. Shoemaker was ever issued by the defendant company, that no agreement to reinsure was ever made, and that no application for such reinsurance was ever made by any one for or on behalf of Mrs. Shoemaker or any one interested in the property.

The evidence does not show that the Lombard company, or its receivers, or the Concordia company were the agents of the defendant company, nor does it appear that Crutcher, or Crutcher & Welsh, or defendant had ever agreed with any person to issue a policy of insurance upon the plaintiff's property. Defendant, acting through its agents, Crutcher & Welsh, was ready to insure plaintiff's property whenever authorized so to do by any one having an insurable interest therein; but the opportunity it gave was neglected. At most, the extent of the authority given to Crutcher & Welsh by the Lombard company, or by its receivers, or by the Concordia company, was to look after the insurance and to attempt to procure insurance business from the mortgagor. Upon their failure to do so, the receivers or the assignee of the mortgage could have procured the insurance; but until they did so the insurance company could not be liable. Relative to the bill rendered for the premium, an inference may be deduced that the insurance had been written, but it cannot be said that this

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communication proved a contract of insurance. It rather indicated that the defendant's agents withheld the delivery thereof until some interested party should complete the transaction and make it a binding contract of insurance by paying the premiums and thereby procure a delivery of the policy. After their appointment the receivers arranged with Crutcher & Welsh to carry for a short time risks on mortgaged property which was owned by the Lombard company, and which had not been sold or disposed of when the receivers were appointed. Such insurance was not represented by any insurance policy, but by a special contract, the terms of which are not made clear by the evidence. But it is clear that this special arrangement did not include property, the mortgage on which had been sold by the mortgagee. The insurance on such property was not carried by Crutcher & Welsh; but they solicited such business and wrote the same when requested by interested parties. In view of the evidence that defendant company never insured the plaintiff's property, and never made a contract that it would insure the same, we must take it that the bill rendered for the premiums was intended as a forceful reminder that the old policy had expired. In other words, the inference it raises is insufficient to overcome the probative effect of the other facts adduced. Neither do the letters written to plaintiff by the Concordia company demanding payment of the premium prove any liability of the defendant. In our view of the evidence, it is wholly lacking to establish the allegations of the petition that defendant ever agreed to insure her property, or that such insurance was ever applied for.

In this state of the case, the district court did not err in directing a verdict for the defendant, and we recommend an affirmance of its judgment.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHARLES W. PARKER ET AL., APPELLEES, v. CLAUDE LOUDON,
APPELLANT.

FILED FEBRUARY 6, 1908. No. 14,925.

Appeal: VERDICT: EVIDENCE. The verdict of a jury based upon conflicting evidence will not be disturbed in this court.

APPEAL from the district court for Logan county: HAN-
SON M. GRIMES, JUDGE. *Affirmed.*

Hoagland & Hoagland, for appellant.

J. E. Morrison, contra.

GOOD, C.

Plaintiffs sued to recover the contract price for pasturing 61 head of cattle for the defendant for the season of 1905. The defendant answered, admitting the contract, and alleged the delivery of a greater number of cattle to the plaintiffs for pasturage, and that, pursuant to the contract, he was entitled to recover the value of the cattle not returned to him at the close of the grazing season. Plaintiffs replied with a general denial. On a trial of the issues a jury returned a verdict for the full amount claimed by the plaintiffs, and defendant appeals to this court.

It is conceded that 61 head of cattle were returned or properly accounted for by the plaintiffs. There is a hopeless conflict of the testimony as to whether a greater number than 61 were delivered to the plaintiffs for pasturage. There is ample evidence to sustain either contention. The jury evidently believed the plaintiffs' evidence, and found accordingly. The rule is well established in this jurisdiction that the findings of a jury based upon conflicting evidence will not be disturbed.

Defendant complains of certain instructions of the court, but has not pointed out any rule of law that has been violated, and examination of the instructions fails to disclose any error therein.

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Defendant also complains of the introduction of certain evidence, particularly of the admission of an assessment roll, but the bill of exceptions does not disclose that the assessment roll is included in or attached to it. After diligent search we are unable to find this bit of evidence in the record.

No error being apparent, the judgment of the district court should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

**JAMES KOTERA, APPELLANT, V. AMERICAN SMELTING &
REFINING COMPANY, APPELLEE**

FILED FEBRUARY 6, 1908. No. 15,012.

1. **Master and Servant: INJURY: APPLIANCES.** The law requires a master to use reasonable care to provide reasonably safe tools and appliances with which, and a reasonably safe place in which, his servant is to perform the duties assigned him.
2. —: **NEGLIGENCE: QUESTION FOR JURY.** Whether or not a master who requires his servant to stand upon two parallel, horizontal, iron rods 12 inches apart and about 8 feet above the floor, and to draw, by means of an iron hook, a slide weighing 200 pounds, without providing any railing, or other safeguard, to prevent the servant from falling in the event of his losing his footing, or the hook slipping from the slot in the slide, is guilty of negligence in failing to exercise reasonable care to provide a reasonably safe place for the servant to work is a question of fact for a jury to determine.
3. —: —: —. Whether or not a master, who furnishes a hook, consisting of an iron bar with a hand-hold at one end, and two inches at the other bent at a right angle to the bar, so as to form an elbow to be inserted into a slot, with which to draw a slide weighing 200 pounds, instead of having the elbow of the hook bent at an acute angle to the bar, or in a curve, so as

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to prevent its slipping out of the slot in the slide, is guilty of negligence in not exercising reasonable care to provide reasonably safe appliances for his servant is a question of fact for a jury to determine.

4. ———: **ASSUMPTION OF RISK.** A servant has a right to assume that his master has used due diligence in providing reasonably safe appliances with which, and a reasonably safe place in which, the servant is to perform his duties, and does not assume the risk of danger arising from the master's negligence in that respect, unless the servant knows and realizes such risk of danger.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Reversed.*

T. J. Mahoney and P. A. Wells, for appellant.

John C. Cowin and Isidor Ziegler, contra.

GOOD, C.

This is an action to recover for personal injuries sustained by the plaintiff while in the employment of defendant. The action is grounded upon the alleged negligence of the defendant in furnishing plaintiff with an unsafe and insecure place in which to work, and in furnishing plaintiff with unsafe and insecure tools and appliances with which to perform the task assigned him. The defendant answered, denying negligence upon its part, and alleging contributory negligence and assumption of risk on the part of the plaintiff. Upon the trial, after the plaintiff had introduced his evidence and rested, the court, on motion of the defendant, directed a verdict in its favor and rendered judgment thereon. From that judgment the plaintiff has appealed to this court.

Defendant, in the conduct of its business, uses a number of furnaces constructed of brick and iron, in which it smelts the ores handled by it. There are four of these furnaces in one room, or building. Each of said furnaces is about 8 or 9 feet high. Immediately above each of these furnaces are hoppers, extending about 3½ feet above them. Upon a level with the tops of the hoppers is an iron plat-

form, or trackway, over which small cars, containing the ore to be smelted, are hauled, and from which the ore is dumped into the hoppers. In the top of three of the furnaces, and beneath the hoppers, are large iron stoppers, or lids, which are lifted by means of iron handles, or bars, attached to the lids, by the employees who handle the ore. When a car of ore is ready to be dumped into one of the hoppers, the stopper, or lid, is lifted, the ore dropped through the hopper into the furnace, and the lid is then replaced. The fourth furnace, which is designated as "No. 1," has the same kind of a hopper, but a different manner of opening and closing. On this furnace, and between the top thereof and the hopper, is a slide constructed of fire brick set in a metal frame, which sets over and acts as a lid to the hole in the top of the furnace, through which the ore is fed into it. This slide is from 18 to 24 inches square, and weighs about 200 pounds; and upon two sides thereof there are slots, or eyes, into which an iron hook is inserted, and by means of this hook the slide is drawn horizontally over the furnace when ore is to be dumped into it. This particular kind of cover had been in use only a year or a year and a half before the accident. It appears that three men are employed at each of these furnaces; one, to attend to the firing of the furnace, is called a "furnaceman," and the other two, to haul the ore and dump it into the furnace through the hopper, are known as "helpers." Across the top of the several furnaces were two iron rods that ran horizontally and formed a part of the construction of the furnaces for holding them in position. These rods were, perhaps, about 1 inch in diameter and were about 1 foot apart, and were evidently 8 or 9 feet above the floor upon which the furnaceman worked. From the evidence it appears that the plaintiff had worked in this room as a helper and as a furnaceman for a number of years, but until the time of the accident had never worked at furnace "No. 1." It appears that at all of the other furnaces the stoppers, or lids, had been lifted by the helpers. In the case of furnace "No. 1" the

slide was operated by the furnaceman in the following manner: The furnaceman, by a ladder, ascended to the horizontal iron rods running across the top of the furnace, and, standing upon these rods without any platform and without any railing, or safeguards, around him, he inserted into the slot, or eye, on the side of the slide an iron hook, by means of which the slide was drawn from over the hole in the furnace. This iron hook was a bar of iron about 3½ feet long, with a hand-hold at one end, and about 2 or 3 inches at the other end bent at a right angle to the bar, so as to form an elbow. It was this elbow that was placed in the slot, or eye, on the slide, by means of which it was drawn from over the hole. On the day previous to the accident the foreman ordered the plaintiff to take charge of furnace "No. 1" on the following evening and act as furnaceman. Pursuant to this order of the foreman, he took charge of the furnace and fired the same, and, when the helpers came to dump the ore for the first time, he climbed upon the rods and inquired of the helpers if the hook was the tool used in opening the slide, and was informed that it was. Thereupon he took the hook, inserted it into the slide, and made two efforts to draw it from over the furnace, but failed. He then braced himself, by placing his left hand against the hopper, and exerted more force to draw the slide, when the elbow of the hook slipped out of the slot, and the plaintiff was precipitated backwards, and fell to the floor 8 or 9 feet below, and suffered severe injuries.

The accident occurred in the evening about 8 o'clock. At this time the plaintiff was working on what was called the "night shift." The room was lighted by incandescent electric lamps. It was claimed that the lamps were covered with dust, smoke and grime to such an extent that they gave a dim and insufficient light for performing the work. Plaintiff also contended that the defendant was negligent in not providing a railing, or safeguard, around the place where the furnaceman had to stand upon the rods when drawing the slide, and that the place furnished,

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in which to perform the task, was unsafe and dangerous, and that the kind of hook furnished for drawing the slide was an improper appliance; that it should have had the elbow turned either at an acute angle or so as to form a curved hook, so that when placed in the eye and pulled upon it could not slip out. On the other hand, the defendant contends that the light was sufficient to enable the plaintiff to see where and how to place the hook in the eye, and that the lights were the same as had been regularly furnished and by which the labor had been performed for many years, and that, if there was any deficiency in the light, the plaintiff was fully aware of it and assumed the risk incident to performing his labor in a dim light. It also contended that the iron bar with the elbow upon it was a proper appliance with which to draw the slide, and the rods formed a safe place to stand upon; but that, if they were not a proper appliance and a safe place, the plaintiff was fully cognizant thereof, and that, if any defect existed, it was open and obvious to him, and that by undertaking to perform the task without protest he assumed the risk of dangers in the performance of the duty assigned him. So far as the dim light is concerned, it appears from the testimony of the plaintiff that by the light furnished he was able to see the eye and to place the elbow therein. Were that the only cause for complaint, we should be constrained to hold that the evidence failed to show that it was the cause of plaintiff's injuries. With reference to the place where the plaintiff had to stand, it would certainly seem safe, so far as the strength of the material was concerned.

The law requires a master to use reasonable care to provide reasonably safe tools and appliances for his servant, and a reasonably safe place in which to perform the duties assigned him. This rule of law is well established, and has been upheld in the following decisions of other courts: *Burns v. Delaware & A. T. & T. Co.*, 70 N. J. Law, 745; *Buehner v. Creamery Package Mfg. Co.*, 124 Ia. 445; *Walker v. Simmons Mfg. Co.*, 131 Wis. 542. It has been

so expressly decided in this court, as to the duty of the master to furnish reasonably safe tools and appliances, in the case of *Vanderpool v. Partridge*, 79 Neb. 165. Under this rule, can it be said as a matter of law that the defendant was not guilty of negligence in requiring the plaintiff to stand and balance himself upon the iron rods and use enough force to pull a slide weighing 200 pounds, without any railing, or safeguards, to prevent his falling in case the hook should slip or he should lose his footing? We think this question must be answered in the negative. There is no reason apparent why a railing, or safeguard, could not have been constructed around the place where plaintiff was required to stand to perform the duty. And it would appear that it would have been much safer to have provided a hook with the elbow turned at an acute angle, or in a curve, so as to prevent its slipping from the eye, or slot, in the slide when pulled upon. At least, we are convinced that the evidence is such as would have warranted a jury in finding that the defendant was negligent in the appliances furnished, and in its failure to provide railings, or safeguards, around the place in which plaintiff was required to stand while drawing the slide. Upon the question of defendant's negligence, there was ample evidence, in our view, to require the submission of the case to the jury.

The more vital question in the case is: Did the plaintiff assume the risk of the danger to which he was exposed? It is a well-recognized rule of law that a servant ordinarily assumes the risk of the dangers that are usually incident to his employment. But this does not require him to assume the risk of dangers due to the negligence of the master, unless such risk is known to him. The servant has a right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of his employer's negligence in performing such duties. The employee is not obliged to pass judgment upon his employer's methods of transacting his business, but may assume that reasonable

care will be exercised in furnishing the appliances necessary for its operation. *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64; *New Omaha T.-H. E. L. Co. v. Dent*, 68 Neb. 674; *New Omaha T.-H. E. L. Co. v. Rombold*, 73 Neb. 259; *Chicago, R. I. & P. R. Co. v. McCarty*, 49 Neb. 475. The rule of employer's liability, however, is different where the servant knows of the defects, or where they are so plainly observable that he would be presumed to know of them. From the record it is apparent that the plaintiff had only a superficial, general knowledge of how the slide was operated by seeing others perform that duty. He had seen this done repeatedly in the year and a half that it was in operation. The kind of hook used was simple, and the manner of using it would be apparent to any man of ordinary intelligence. The lack of any railing, or guard, was also open and apparent, and, if plaintiff had been injured by falling from the rods while climbing upon them, or about to attend to his duties, we think he would not be in a position to complain. But there are other circumstances which the record does not show that plaintiff knew. It is not shown that at the time of the accident he knew the weight of the slide, or the strength required to move it. Nor is it shown that he knew, or had reason to know, that there was any danger of the hook slipping out of the eye. But, even if he should be supposed to know of the danger of the hook slipping from the eye, still, unless he had some approximate knowledge of the weight of the slide and the power or strength necessary to draw it aside, he would not realize the danger to which he would be exposed by standing in such a place to operate it. Under these circumstances, we do not think it can be said that the danger was open and obvious, nor that from his observation he was negligent in not knowing the amount of force necessary to operate the slide. We think it was a question of fact for the jury to determine from the evidence whether or not the plaintiff assumed the risk of danger in operating the slide. It must not be overlooked that he had not operated the slide before. He therefore

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had no knowledge from actual experience of the power necessary to be exerted, and, until he had made the attempt to operate the slide, we think it cannot be said that he was in a position to know and fully realize the danger of injury in attempting to operate it without any safeguards or railings. We are constrained, therefore, to hold that, under all the circumstances, the case presented was one that should have been submitted to the jury for its determination, and that it was error in the trial court to hold as a matter of law that the defendant was not liable.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

ANSON E. BECKER, APPELLEE, v. ADOLPHUS F. LINTON ET AL., APPELLANTS.

FILED FEBRUARY 6, 1908. No. 15,051.

1. **Process: CONSTRUCTIVE SERVICE: AFFIDAVIT.** An affidavit for service by publication is not rendered invalid because it has a caption, nor because the persons named in the affidavit, against whom the petition is filed, are referred to as "defendants."
2. ———: ———: ———. The allegation "that said defendants and each of them are non-residents of the state of Nebraska, and that service of summons cannot be made within this state upon said defendants or any of them," is a sufficient allegation of fact, and is not open to the objection that it alleges a mere conclusion of law.
3. **Judgment: COLLATERAL ATTACK.** Where a question of fact or of law has been litigated in a court having jurisdiction of the parties and the subject matter of the action, its judgment upon such

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question is final, and cannot be collaterally attacked in another court, though the latter might have reached a different conclusion upon the same question.

4. ———: *RES JUDICATA*. A judgment of a court having jurisdiction of the parties and the subject matter of the action is generally conclusive evidence of the fact that the indebtedness existed at the time of the rendition of the judgment; and such judgment and the pleadings upon which it is based are sufficient to establish the existence of the indebtedness as of the date of the filing of the petition.
5. Antenuptial contract set out in the opinion examined, and *held* to be executory, and not to vest any estate in the children of the parties to the contract.
6. **Fraudulent Conveyance: SUIT TO ANNUL.** Real estate, which has been conveyed without consideration in fraud of creditors of the grantor, may be levied upon and sold under an execution as the property of the grantor. In such case, the grantor, as to the execution creditor, has more than an equitable interest in the realty conveyed, and the purchaser at the execution sale may maintain an action against the fraudulent grantee to cancel the fraudulent conveyances and to quiet his title.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Affirmed.*

John O. Yeiser, for appellants.

Frank H. Gaines, J. A. Story and E. G. McGilton,
contra.

GOOD, C.

This is an action to cancel two certain deeds and to quiet title to certain real estate in Omaha. The defendants are nonresidents. Service was had by publication. A special appearance was made on behalf of the defendants, and objections to the jurisdiction of the court over the defendants were overruled. Defendants, still reserving the question of jurisdiction, answered, denying the plaintiff's title, and alleging that the title was held in trust by defendant Adolphus F. Linton for the defendants Charles S. and Fryda Linton. Plaintiff's reply was a general denial. Upon a trial, the district court found all the issues in

favor of the plaintiff, and entered a decree canceling the deeds and quieting his title. From this decree the defendants have appealed to this court.

The record discloses the following facts, out of which this controversy arises: The defendants, Adolphus F. and Phœbe R. E. E. Linton, are husband and wife, and the defendants, Charles S. and Fryda Linton, are their children. Prior to the marriage of Adolphus F. and Phœbe Linton a contract was entered into between them, which, omitting the formal parts, is in the following language: "It is agreed that all the moneys and property that said intended wife may become or is in possession of, or that she may at any future time become entitled to, shall be free from the debts, control and engagements of the said intended husband, and settled upon herself for her sole and separate use, and be divided amongst the children of the said intended marriage in such shares as the said intended husband and wife may appoint, but subject nevertheless to the said husband taking a vested life interest in any such money or property as above mentioned, in the event of his surviving the said intended wife. And it is further agreed between the parties that a formal deed of settlement shall be drawn up between the parties embodying in effect the said agreement as soon as conveniently possible after said marriage." Several years after the marriage Mrs. Linton inherited considerable real estate in Omaha, Nebraska, and in other places. On the 4th day of July, 1891, Mrs. Linton executed a power of attorney to Mr. John B. Finley, authorizing him, among other things, to mortgage her real estate. Finley, pursuant to the power vested in him, executed a number of mortgages upon various parcels of real estate belonging to Mrs. Linton. One of these mortgages, bearing date of June, 1892, and due June 1, 1897, was in favor of the National Life Insurance Company, to secure a note which was also executed by Finley on behalf of Mrs. Linton. In November, 1896, the Lintons having made default in the conditions of this

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mortgage, the National Life Insurance Company commenced suit in the circuit court of the United States for the district of Nebraska against Mr. and Mrs. Linton to foreclose the mortgage. In this foreclosure action the complainant specifically prayed for a deficiency judgment in the event that the premises should fail to sell for sufficient to pay the amount due it. Issue was joined and a trial had, resulting in a decree in favor of the complainant, awarding a foreclosure, and findings and decree that it was entitled to a deficiency judgment in case the mortgaged property failed to sell for sufficient to satisfy the decree and costs. The defendants carried that cause to the circuit court of appeals, where the decree and judgment of the circuit court was affirmed. Thereafter, a sale of the premises was had pursuant to the order and decree of the circuit court. This sale failed to realize sufficient to pay the costs and the amount adjudged to be due the complainant. The complainant then moved for a deficiency judgment, to which objections were filed by the defendants. The court found in favor of the complainant, and awarded a deficiency judgment for \$1,982.54, and awarded execution thereon. Thereafter, execution was issued and levied upon the property in controversy herein as the property of the defendant Phoebe R. E. E. Linton, and the property was sold to the plaintiff in this action. Objections were made to the sale and to the distribution of the proceeds, which were overruled, and a deed was ordered. The United States marshal, on August 28, 1905, executed and delivered to the plaintiff a deed to the premises. At the time of the commencement of the action of foreclosure in the federal court the title to the property stood in the name of Phoebe R. E. E. Linton. Shortly after the delivery of the marshal's deed to the property it was discovered that on the 28th day of June, 1902, deeds had been filed, which purported to have been executed on the 31st day of March, 1897. One of these deeds was from Mrs. Linton and husband to Kate Remnant, and the other, bearing the same date, was from Kate Remnant to Adol-

phus F. Linton. These deeds were not filed until long after the entering of the deficiency judgment against Mrs. Linton in the federal court. The date of the deeds is intermediate the commencement of the action and the entry of judgment. The plaintiff, purchaser at the execution sale, brought this action to cancel these two deeds and to quiet the title to the property in him. No consideration passed from either Kate Remnant or Adolphus F. Linton for the transfer. The defendants claim that it was for the purpose of vesting title in Mr. Linton pursuant to the antenuptial contract above referred to. The plaintiff in this action claims that the transfers were made for the purpose of hindering and delaying the creditors of Mrs. Linton in the collection of their demands against her, and particularly the claim of the National Life Insurance Company; that the conveyances were fraudulent and void; and that plaintiff is entitled to have them canceled and his title quieted. The record also shows that at the date of these two deeds Mrs. Linton was heavily involved, and most of her property in Omaha was heavily incumbered, and about that time a number of judgments were rendered against her, some of which have not yet been wholly satisfied. It also discloses that she was indebted to a considerable extent outside of her mortgage indebtedness.

The first question for determination is the one of jurisdiction raised by the special appearance. There are three objections urged: First, that the affidavit for service by publication is not an affidavit, because it had a caption showing that it was made for a case pending, whereas no case was then pending; second, that the affidavit does not show that service of summons could not be made upon the defendants; third, that it does not show that the defendants were nonresidents of the state of Nebraska. It is true that upon the sheet of paper upon which the affidavit appears, and immediately preceding the venue of the affidavit, there is a caption similar to that which usually heads a petition. Section 78 of the code provides

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that the affidavit must be filed before any publication can be made, and section 19 of the code provides that the action shall be deemed to be commenced as to the defendant at the date of the first publication. Defendants contend that at the time of the making and filing of the affidavit no action was pending, and that it was, therefore, improper to have a caption upon the affidavit; that the affidavit purports to be in a pending action, and, because no such action was pending, such affidavit could not be the basis of a prosecution for perjury if it were false. This contention finds support among the English authorities, and, apparently, among some of the courts of this country. This objection appears to us to be extremely technical and without merit. The affidavit was complete without the caption. The caption forms no part of that which was sworn to, and is not a part of the affidavit. The caption preceding the affidavit amounted to nothing more than a means of identification as to the case in which it should be filed. In the body of the affidavit it is stated that a petition has been filed in a certain court and against certain parties, naming them, and the object and prayer of the petition are set forth. It appears to us that the affiant would be subject to a prosecution for perjury if the material allegations of the affidavit were untrue and falsely sworn to. It is true that in a certain sense the action was not yet pending. Section 19 of the code referred to relates to the time of the commencement of the action as regards the statute of limitations, and it is in this respect only that the action is not commenced until the first publication. We think it is the common understanding, however, that a case is commenced when the petition is filed, and that it is so generally understood and spoken of. Every pleading, petition or preliminary paper in any case bears a caption. The plaintiff in verifying the petition refers to himself as the plaintiff, and yet, as regards this particular section of the code, the action is not pending until the summons is issued, or until the first publication where constructive service is had. In

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the case of *Crombie v. Little*, 47 Minn. 581, it was said: "Another objection to the affidavit is that it was void because entitled in a cause not yet commenced. There are undoubtedly decisions which go to this length, but they are, in our judgment, devoid of reason, and based upon a frivolous technicality. We do not suppose there was ever an affidavit made in this state for a replevin, garnishment, attachment, or publication of a summons that was not thus entitled, although, strictly speaking, the action was not yet commenced when the affidavit was sworn to. Even at common law it was, at most, a mere irregularity, which, in the language of the court in *Clarke v. Cauthorne*, 7 Term Rep. 321, 'did not interfere with the justice of the case.' A prosecution for perjury based on such an affidavit would lie. *City Bank v. Lumley*, 28 How. Pr. (N. Y.) 397. See, also, *People v. Sutherland*, 81 N. Y. 1, 9." While this opinion is severely criticised by counsel for appellants, we are impressed with the good common sense exhibited therein. In our opinion, the objection to the jurisdiction because the affidavit had a caption is entirely without merit. The second and third objections to the affidavit are that it does not show that service of summons could not be had upon the defendants, and that they were nonresidents of the state of Nebraska. We find in the affidavit the following: "Affiant further states that said defendants and each of them are nonresidents of the state of Nebraska, and that service of summons cannot be made within this state upon said defendants or any of them." The point to the objection is that the Lintons are designated under the name of "defendants," instead of their names. In the body of the affidavit the names of the persons against whom the action was being commenced were set out in full, and, after the object and prayer of the petition are given, the statement last quoted appears. These objections, like the first, are hypertechnical, and are based upon the theory that there was no action pending, and that referring to the persons as defendants was not a sufficient designation of the parties. We think that the designation was suffi-

cient, and that the objections to the jurisdiction of the court were properly overruled.

Defendants attack the deficiency judgment upon which the deed to the plaintiff in this action rests, and claim that the judgment is a nullity as to the defendants Charles and Fryda Linton. It will be observed that this is a collateral attack upon the judgment. A judgment may be collaterally attacked where it does not respond to the issues raised by the pleadings. Appellants contend that the deficiency judgment is void because it was unsupported by the petition upon which it was rendered. They urge that the petition discloses that the note was executed by an attorney in fact for Mrs. Linton; that the power of attorney under which he acted, being set forth and attached to the petition, disclosed that it was not broad enough to authorize the execution of a promissory note or any personal obligation of Mrs. Linton, and that it went no further than to authorize the pledging of her property by mortgage. It is true that this same power of attorney has been held, in the case of *Morris v. Linton*, 4 Neb. (Unof.) 550, not broad enough to justify the binding of Mrs. Linton to a personal obligation, and this court refused to render a deficiency judgment upon another mortgage executed under this same power of attorney and in the same manner. An examination of the petition in *National Life Ins. Co. v. Linton* discloses that it avers that she executed the note, and, afterwards, it is alleged that her name was signed thereto by her attorney in fact. It will be readily perceived that under the allegations of the petition in that action other proof may have been offered which would show that Mrs. Linton was personally liable. Whether such evidence was offered or not, we are not advised. Nor do we think it material to the inquiry here. Nor do we think the fact that this court took the view that the power of attorney was not broad enough to authorize the attorney in fact to bind Mrs. Linton in a personal obligation is material. The question as to the effect of the power of attorney was properly before the

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United States circuit court. It had jurisdiction of the parties and jurisdiction of the subject matter. It was called upon to determine that question, which was embraced within the issues presented to it for determination. Its decision upon these questions is final, unless reversed by a court to which it might be carried on error or appeal. This court cannot act as a court of review to determine any possible errors that might have been made by the United States circuit court. *Ferguson v. Kumler*, 11 Minn. 62; *Bank of Wooster v. Stevens*, 1 Ohio St. 233, 59 Am. Dec. 619; *Swihart v. Shaum*, 24 Ohio St. 437; *Minnesota Threshing Mfg. Co. v. Schaack*, 10 S. Dak. 511; *Faber v. Matz*, 86 Wis. 370; *Carpenter v. Osborn*, 102 N. Y. 552; *Millard v. Parsell*, 57 Neb. 178. It therefore follows that the judgment of the circuit court is conclusive upon the question of the liability of Mrs. Linton to a deficiency judgment.

Defendants further claim, however, that the judgment goes no further than to establish the fact of indebtedness at the date of its rendition. If nothing but the judgment had been offered in evidence, there might have been some merit in this contention, but in this case the original and amended bills filed in the United States circuit court were offered in evidence, and these show the issues that were presented by the complainant in that case, and upon which that court rendered the judgment. We think it must be held conclusive that the court necessarily determined that Mrs. Linton's obligation was a personal obligation, and that it existed at the time of the filing of the bill in November, 1896. We need not go further to ascertain whether or not it determined that the obligation existed at a time anterior to the filing of the bill, because the bill was filed prior to the date of the deeds sought to be canceled in this action. The evidence in this case establishes the fact of Mrs. Linton's personal obligation and liability to the National Life Insurance Company previous to the date of the deeds. It therefore follows that plaintiff by his deed based upon the deficiency judgment obtained a

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good title to the premises as against Mr. and Mrs. Linton.

Defendants contend that the transfers were not fraudulent or without consideration, and that they were based upon the antenuptial contract, and that said contract was a sufficient consideration, and that the defendants, Charles and Fryda Linton, took the property as purchasers. This same antenuptial contract or agreement has been before this court in other cases, and it has been practically held that it was merely an executory agreement, and amounted to naught, so far as giving anything to the children of Mr. and Mrs. Linton, until it was further carried into effect by a deed of settlement. *Morris v. Linton*, 74 Neb. 411. We think a careful examination of this ante-nuptial agreement will show clearly that it was not the purpose or intent of the parties to it to divest Mrs. Linton of her property and to vest it in her children to be thereafter born; but rather it was to preserve and save to her the property that she had then, or might thereafter acquire, free from the claims and liabilities of her intended husband. In any event, it is clear that it could not have the effect to create any trust or vest any title in trust in the children until some further action was taken. It shows upon its face that it was so intended, and that it was within the contemplation of the parties that, after the marriage, a deed of settlement should be executed. It will also be observed that the property should be divided among the children of said marriage in such shares as such husband and wife might appoint. Until they had determined this, it is clear that nothing could vest in the children. Without any further action being taken than the execution of this agreement, specific performance could not be enforced. In interpreting an agreement, it is always proper to look to the construction placed upon it by the parties themselves. If we take the construction placed upon this instrument by the parties, it is apparent that they did not intend by this agreement to limit Mrs. Linton's interest in her property to a life estate with a re-

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mainder to her children. The record in this case discloses that mortgage after mortgage for large sums have been placed upon various tracts of real estate, in which Mr. and Mrs. Linton have both joined. The power of attorney which was executed by both Mr. and Mrs. Linton authorizes their attorney in fact to sell and mortgage and convey any and all of the property she might have in the United States, so that the construction which is now sought to be put upon the antenuptial agreement would appear to have been brought about by the financial straits in which Mr. and Mrs. Linton have found themselves, and as a resort to protect them in the enjoyment of property that should go to satisfy their just obligations. This view is strengthened by the affidavits and depositions of both Mr. and Mrs. Linton, which were taken in another cause, and which were offered in evidence in this case. The affidavits bear date of October 19, 1901, and the depositions bear date of December 21, 1901. On both occasions both Mr. and Mrs. Linton testify under oath with reference to the lots in controversy that they were deeded to Adolphus F. Linton only for convenience, for him to hold in trust for Mrs. Linton, and that she is still the owner thereof. The affidavits and depositions in the other case, therefore, show that as late as December, 1901, Mrs. Linton was the owner of the property, and that the purpose of the conveyances, as then stated, was one of convenience. Such conduct does not impress one with a belief that the Lintons are now sincere and honest in claiming that these conveyances were made for the purpose they now assert. It is true that a deed of settlement now appears of record, bearing date of May 17, 1901, but this deed of settlement was made and recorded long after the rendition of the deficiency judgment against Mrs. Linton. In any event it could have no more effect than a voluntary conveyance without consideration made by Mrs. Linton to her children. The antenuptial contract created no obligation that could have been enforced by her children. It therefore follows that any conveyance made by her to them, or made

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by her to some other person to be held in trust for them, based solely upon this contract, was without consideration, and amounted to a mere voluntary conveyance, which would be void as against creditors.

The defendants contend that, as the legal title to the property in controversy was vested in Mr. Linton at the time it was levied upon under the execution, it was not subject to execution, for the reason that Mrs. Linton had only an equitable interest in the property, and that an equitable interest in real estate is not subject to execution. If it were true that Mrs. Linton had only an equitable estate in the property in controversy, then, under the rule announced in *Dworak v. More*, 25 Neb. 735, and *First Nat. Bank v. Tighe*, 49 Neb. 299, it might not be subject to sale on execution. In this contention the defendants apparently lose sight of another principle of the law which is applicable, and that is that, as to the creditors, the fraudulent conveyance is void, and is the same as if no conveyance had been made. And where property has been conveyed to a third person in fraud of the grantor's creditor, the latter, on obtaining judgment, may have his choice of remedies, either to bring an action to set aside the conveyances, or to levy upon the property and have it sold. If there are no bidders, he may become the purchaser thereof, and then litigate the question of title with the fraudulent grantee. This rule is recognized in *Bachle v. Webb*, 11 Neb. 423, and *Westervelt v. Hagge*, 61 Neb. 647. Under the rule announced in these cases, the property of Mrs. Linton in the hands of her husband, or others to whom it had been fraudulently conveyed, was subject to the execution for the satisfaction of the deficiency judgment.

Some objection is made by the appellants that the record does not disclose any fraudulent intent on the part of Mr. and Mrs. Linton in the making of the deeds. We do not understand the rule to be that it is necessary to prove a specific intent. The intent may be gathered from the acts of the parties, and a conveyance becomes fraudu-

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lent in law when it is shown that it was made for the purpose of placing the property beyond the reach of creditors, or that it would hinder or delay them in collecting their just demands. The evidence in this case warrants the findings that the conveyances in question were made for the purpose of placing the property beyond the reach of Mrs. Linton's creditors, and of hindering and delaying them in the collection of their just demands. It follows that the conveyances in question were void as to Mrs. Linton's creditors, and that the plaintiff was entitled to the relief afforded him by the decree of the district court.

We therefore recommend that the decree of the district court be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

SCHOOL DISTRICT NO. 25, APPELLEE, v. T. W. DE LONG,
COUNTY TREASURER, APPELLANT.

FILED FEBRUARY 6, 1908. No. 15,035.

1. **Injunction: PETITION: CONSTRUCTION.** The rule that under the code pleadings should be construed liberally applies only to ordinary actions. In all cases of application for any extraordinary writ, the petition will receive a strict construction.
2. **Petition examined, and held** not to state facts sufficient to constitute a cause of action for equitable relief.

APPEAL from the district court for Brown county:
JAMES J. HARRINGTON, JUDGE. *Reversed.*

L. K. Alder, for appellant.

P. D. McAndrew, *contra*.

FAWCETT, C.

On February 3, 1906, appellee filed in the district court for Brown county the following petition: "Your petitioner, School District No. 25, complaining of the defendants above named, says: (1) That it is a duly constituted subdivision of the county of Brown, a body politic, corporate, duly organized and existing under and by virtue of the laws of the state of Nebraska, and has been so organized at all times mentioned in this petition, and C. Langley is its duly elected, qualified and acting treasurer. (2) That the above named T. W. De Long is the duly elected, qualified and acting treasurer of said Brown county, and Edward Moore, Luke M. Bates and Frank Lessif are the duly elected, qualified and acting board of county commissioners of said county. (3) That E. A. Ikenburg, C. E. Ikenburg and W. C. McNamara are each resident freeholders and own personal and other property in said school district subject to taxation in said district. That in the year 1905 the assessor of Smith precinct, of which precinct said School District No. 25 constitutes a part, duly assessed all property for taxation within said school district, and with other property that of the said E. A. Ikenburg, C. E. Ikenburg and W. C. McNamara, but for some unaccountable reason unknown to your petitioner designated the number of said district as that of 33, and a school tax was duly levied on all of said property, and the said E. A. Ikenburg, C. E. Ikenburg and W. C. McNamara each paid their said school tax under protest, and the said board of county commissioners at a meeting of their body held in Ainsworth on the 29th day of January, 1906, did issue an order, duly signed by their chairman, the said Edward Moore, directed to the treasurer of said Brown county requiring him, the said treasurer of said Brown county, to refund to the said E. A. Ikenburg the school tax so assessed, levied and paid, to wit, the sum of \$2.83, and to refund to the said C. E. Ikenburg the said school tax so levied and paid by him, to wit, the sum of \$3.75, and

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ordered the said county treasurer to refund to the said W. C. McNamara the said school tax so levied and paid by him, to wit, the sum of \$124.30, and the said county treasurer is about to comply with said orders of the said board of county commissioners, and unless restrained by an order from this court will refund said several amounts of moneys to said parties, and unless restrained your petitioner greatly fears and apprehends that the said county commissioners will issue other orders to the said county treasurer requiring him to refund school taxes to other parties in said School District No. 25 that are legally assessed and levied. (4) That all the school taxes that have been so assessed, levied, paid, and ordered refunded as above alleged rightfully and legally belong to the school fund of said School District No. 25, and great and irreparable damage will befall said school district, and it will be deprived of the benefits of a school for the coming year for want of funds if said moneys are not paid over to said school district; that said district is scarce of funds at the present time and in debt, and no school can be held in said district for some time to come unless the duly levied taxes for the year 1905 are paid into its treasury. (5) Plaintiff alleges it has no adequate remedy at law, and that unless defendants are restrained it will suffer irreparable loss as above set forth. Wherefore plaintiff prays that a temporary injunction may be granted restraining said defendants as follows: (1) That T. W. De Long, county treasurer aforesaid, be restrained from refunding said school tax to the said E. A. Ikenburg in the sum of \$2.83 or any other sum whatsoever, to the said C. E. Ikenburg in the sum of \$3.75 or any other sum whatsoever, to the said W. C. McNamara in the sum of \$124.30 or any other sum whatsoever. (2) That the said board of county commissioners be restrained from issuing any further orders to the said T. W. De Long requiring him to refund to any persons whomsoever moneys levied for school purposes which is shown by the records of his office to have been levied within the boundaries of School District No.

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25, and that upon the final hearing of this case it may be adjudged and decreed that the temporary injunction granted in this case be made perpetual, and that all the school taxes levied within the boundaries of said School District No. 25 be adjudged to belong to the plaintiff, and for such other and further relief as equity and good conscience may grant. School District No. 25, Brown county, C. Langley, Treas. By P. D. McAndrew, its Attorney." To which was added an affidavit as follows: "State of Nebraska, Brown county. I, C. Langley, plaintiff in the above entitled action, being first duly sworn, depose and say that W. H. Westover and J. J. Harrington, judges of the district court for Brown county, are absent therefrom, and the affiant is desirous of obtaining a temporary order of injunction from the county judge of said county."

Afterwards on the same day there was filed what is termed an "Order of Injunction." This paper runs to the defendants, and assumes to enjoin them in the manner prayed in the petition. It is not entitled in any cause or court, nor does it purport to be an order granted by any judge. It is signed "H. S. Jarvis, Clerk District Court." As counsel for defendants treated this paper as a valid order of injunction by assailing it by motion and demurrer on grounds other than those indicated, we will assume that the clerk omitted both the Alpha and Omega of the paper in copying it in the transcript, and treat it as a temporary injunction issued by the county judge.

Defendant De Long filed a motion to vacate the order of injunction on three grounds: (1) That the court had no jurisdiction; (2) that several causes of action were improperly joined, and different reliefs improperly asked; (3) that the petition did not state facts sufficient to constitute a cause of action. He also demurred to the petition on four grounds: (1) That plaintiff had not legal capacity to sue; (2) that the court was without jurisdiction; (3) that several causes of action were improperly joined, and different reliefs improperly asked; (4) that

the petition did not state facts sufficient to constitute a cause of action. The court overruled both the motion and demurrer, and in the journal entry says: "And said defendant, electing to stand upon his said motion and demurrer, and refusing to plead further, the court finds that by filing said demurrer the defendant confessed the allegations of plaintiff's petition to be true. It is therefore ordered and adjudged by the court that the defendant pay to the plaintiff the amounts stated in plaintiff's petition; viz.: The sum of one hundred thirty and 88-100 dollars, and plaintiff recover its costs, taxed at \$...., and the injunction issued herein is hereby made perpetual. To each and all of said findings, orders and judgment the said defendant T. W. De Long duly excepted."

We dislike the idea of causing appellee any further costs in obtaining the taxes to which we have no doubt it is entitled, but we are compelled to hold that the district court erred in overruling both appellant's motion and demurrer. Appellants argue in their brief that the Ikenburgs and McNamara paid their taxes and demanded a return of the same under the first provision of section 10561, Ann. St. 1903, while appellee contends that they proceeded under the second provision of that section, and in their brief set out the notices that were served by them. The trouble with all this is that the petition does not contain any allegations which disclose any such state of facts. The petition does not allege any facts which show that the board acted without jurisdiction so as to render their proceedings void, nor does it allege that there is no such school district in Smith precinct as District No. 33. If the protesting taxpayers were proceeding under the first provision of section 10561, then, if the board acted wrongfully, appellee had a right of appeal, and could not maintain this suit. If, on the other hand, they were proceeding under the second provision of that section, no right of appeal existed, and the remedy by injunction could be resorted to. *Chicago, B. & Q. R. Co. v. Nemaha County*, 50 Neb. 393; *Custer County v.*

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Chicago, B. & Q. R. Co., 62 Neb. 657. On all these important points the petition is silent.

Plaintiff asks to have De Long enjoined from doing an act which he has already been commanded to do, namely, the repaying to the Ikenburgs and McNamara of the moneys they had paid under protest, and asks to have the other defendants enjoined from making orders in favor of other taxpayers. There is no allegation of conspiracy or confederation between De Long and the other defendants, nor is there any allegation that any other taxpayer in District No. 25 has paid his taxes under protest, and that the defendants, members of the board, are threatening or intend to order such taxes refunded. Even if the petition contained these allegations, the further fact that plaintiff in its prayer asks a separate, distinct and different relief against De Long from that asked against the other defendants brings the case within the rule laid down in section 88 of the code, and announced by this court, in *Barry v. Wachosky*, 57 Neb. 534. We think that the lines have been drawn too loosely in the district courts of this state in the use of the writ of injunction. Instead of being an extraordinary legal remedy, to be invoked only when there is no adequate remedy at law, it has degenerated into a common, every-day writ, resorted to too frequently for the purpose of trying to circumvent some plain and adequate remedy at law. It is time to call a halt, and to deny the writ in all cases where the right to it is not made perfectly clear in the petition of the applicant therefor. It is a fair inference that a pleader can and will allege in his petition all that he can prove on the trial, and, if the petition fails to state facts sufficient to entitle the plaintiff to recover in any action, the case should not proceed further. We are not unmindful of the rule that under our code pleadings should be construed liberally; but that rule should be applied to ordinary cases only, and not to applications for any extraordinary writ. In all such cases the petition should receive a strict construction. Applying that rule

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to the petition in the case at bar, we think the district court erred both in overruling the motion to vacate the temporary injunction and in overruling the demurrer, except as to the first paragraph of the demurrer. In that, the court was right.

Ordinarily, in reversing a judgment on these grounds, this court will order a dismissal of the action; but, under the circumstances of this case, we think that the judgment of the district court should be reversed and the cause remanded, with leave to appellee to file an amended petition, and we so recommend.

AMES and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with leave to appellee to file an amended petition.

REVERSED.

S. D. CHILDS & COMPANY, APPELLEE, v. OMAHA PARAPHERNALIA HOUSE, APPELLANT.

FILED FEBRUARY 6, 1908. No. 15,066.

1. **Contracts:** CONSTRUCTION. The words "as soon as possible" in a contract for the manufacture of certain specified goods mean "with all reasonable diligence" or "without unreasonable delay."
2. **Evidence examined,** and *held* sufficient to sustain the findings and judgment of the district court.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

Carr, McKenzie & Howell, for appellant.

Richard S. Horton, contra.

FAWCETT, C.

This suit is based upon an order received by appellee from appellant to manufacture 300 masonic levels, or

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plumbs, as they are sometimes designated in the record. There was a trial to the court, the intervention of a jury being waived. From a finding and judgment in favor of appellee, appellant prosecutes this appeal.

The record shows that on January 6, 1905, appellant addressed to appellee the following letter: "Omaha, Nebraska, Jan. 6, 1905. S. D. Childs & Co., Chicago, Ill. Gentlemen: Inclosed you will find sketch of masonic level for which you will kindly make me 300 as soon as possible. Omaha Paraphernalia House." The masonic levels referred to were to be made of aluminum, and to be printed according to a sketch furnished appellee by appellant. They were designed for use on January 26, 1905, at the forty-eighth anniversary of Capitol Lodge No. 3, Omaha. The evidence shows that the order contained in the letter of January 6 was received by appellee on January 10. On January 20 appellant wrote the following letter: "Omaha, Neb., Jan. 20, 1905. Mr. S. D. Childs & Co., 200 Clark St., Chicago, Ill. Gentlemen: I desire to call your attention to the fact that the masonic plumbs should be here in plenty of time for delivery on Jan. 25th, so do not disappoint me by not having them here by that time. Sincerely, (Signed) Charles Callanan." This letter was mailed to appellee and received by it about 10 o'clock in the forenoon of the next day. The witness Charles Callanan, secretary of appellant, testifies that on the morning after writing the letter of January 20 he discovered that he had made a mistake in fixing the time for delivery as late as January 25, and immediately sent appellee the following telegram: "S. D. Childs & Co., 200 Clark St., Chgo. Ship masonic plumbs today sure. Will hold their meeting Monday night. (Signed) Omaha Paraphernalia House." The witness Greenberg, manager of appellee's manufacturing department, testified that on receipt of that telegram they immediately wired appellant as follows: "Omaha Paraphernalia House, Omaha, Neb. Impossible to ship until Monday. S. D. Childs & Co." And also followed that telegram with the following letter: "Jan. 21,

1905. Omaha Paraphernalia House, Omaha, Neb. Gentlemen: Answering your telegram of even date, it is utterly impossible to ship the PLUMBS today. The date specified was the 26th, and we expected to ship on the 25th, so they would be on hand the next day. We will, however, send them on Monday, so they will reach you Tuesday. To have sent them today would have been to spoil them, as it takes several days for the ink to dry on aluminum. Regretting we could not accommodate you, and hoping they will be there in plenty of time for use before the 25th, we remain, Yours very truly, (Signed) S. D. Childs & Co." On receipt of the above telegram appellant wired appellee as follows: "Omaha, Neb., Jan. 21, 1905. S. D. Childs & Co., Chicago, Ill. Can't use unless in Omaha Monday morning. Omaha Paraphernalia House."

The above constitutes the entire correspondence between the parties. Mr. Greenberg testifies that on receipt of the order on January 10, "This order was placed in our factory in its regular course. It was an article that required special work from beginning to end, something different from anything we had ever manufactured before. It required to be made by hand, to have special dies for stamping same, and to have special printing plate made. No one part of this work could be performed until the preceding part was completed, and printing on aluminum, owing to the fact that aluminum does not absorb ink, is a very difficult process. All the ink on aluminum work remains entirely on the surface, and as a consequence requires considerable time for drying." He also testifies that they started the work immediately after the receipt of the order, and constantly followed it up, as is their custom on all time work. He also says that the goods were complete and in the drying rack at the time they received appellant's letter of January 20 and their first telegram of January 21, and that appellant's second telegram did not reach him until 4:45 P. M. of that day, after their factory had closed for the day; and that they

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shipped the levels on Monday, January 23. By stipulation of the parties it is agreed that the levels reached Omaha by express on the afternoon of January 24, after business hours. Mr. Callanan, secretary of appellant, testifies that he did not go to the express office for the levels, nor call the express office up by telephone, nor make any inquiries in regard to them. He says: "I paid no further attention to them when I got word. I answered that telegram, and said if the goods were not here Monday I could not accept them. I paid no further attention until they were brought for delivery along the latter part of the week."

It will be seen from the above statement of facts that the masonic anniversary was held on Thursday, January 26; that the levels reached Omaha on the evening of the 24th, and could have been obtained from the express office on the morning of the 25th had appellant so desired. But appellant made no effort to obtain them, relying upon its second telegram of Saturday, January 21, as a cancellation of its order, and as releasing it from all obligations to take the levels. Appellant's contention is that, when appellee received the order to manufacture the levels "as soon as possible," it was bound to do it immediately, and, not having done so, that appellee is not entitled to recover for the work done. We do not think that an order sent to a manufacturing company to manufacture a special article "as soon as possible" means "immediately," or that the company must stop all its other work and devote itself to that particular order; but that, as stated in *Rhodes v. Cleveland Rolling-Mill Co.*, 17 Fed. 426, cited by appellant, the term "as soon as possible" means "with all reasonable diligence" or "without unreasonable delay." And, as stated in that case, it must also be said here. "There is nothing in the proof in this case to show that there was any unreasonable delay." The record fails to disclose any facts even tending to show that appellee was in any manner negligent, or that it unnecessarily delayed the filling of the order it had received from appellant.

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There was nothing in the letter of January 6 or in the letter of January 20 to advise appellee that appellant was purchasing these levels for purposes of sale. The design furnished showing upon its face that the levels were for use on January 26, appellee could well assume that if the levels were received in time for use on that date, or, at most, by the day preceding, the delivery would be in ample time. The levels were, in fact, delivered in Omaha upon the 24th, and we are unable to discover in what manner appellant was damaged, except by its own refusal to receive the articles that had been manufactured under its order.

The complaint of appellant is that the judgment is not sustained by sufficient evidence, and that it was incumbent upon the appellee in making out its case in the court below to show a strict compliance on its part with the terms of the contract, and that, as a matter of law, the court erred in finding that the appellee had complied with that part of the contract requiring it, the appellee, to make the goods "as soon as possible." We think it is clear that these contentions must be decided adversely to appellant.

We therefore recommend that the judgment of the district court be affirmed.

AMES and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ULYSSES G. ALBERT, APPELLEE, v. H. C. YOUNG, APPELLANT,

FILED FEBRUARY 6, 1908. No. 15,061.

1. **Appeal: VERDICT: EVIDENCE.** The verdict of the jury should not be set aside as being contrary to the instructions of the court, where the evidence does not establish the fact submitted so clearly that it should have been determined by the court as a matter of law.

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2. —: —: —. While the verdict of a jury should be set aside if contrary to an erroneous instruction of the court, this court is not bound by the theory of such erroneous instruction in determining whether the misconduct of a member of the jury constitutes prejudicial error.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Affirmed.*

Field, Ricketts & Ricketts, for appellant.

J. A. Brown, contra.

CALKINS, C.

The plaintiff and the defendant were each real estate brokers in Lincoln, and were on the 15th day of December, 1905, each endeavoring to sell to one Schoenlaber lands for the sale of which they were respectively agents. The plaintiff claims that at this time he entered into an oral contract with the defendant whereby it was mutually agreed that, if either should succeed in selling a farm to said Schoenlaber, he would divide with the other the commission received by him. In January the defendant made a sale to Schoenlaber, receiving a commission of \$585, and the plaintiff brought this action to recover one-half of said sum under said alleged contract. There was a verdict and judgment for the plaintiff, from which the defendant appeals.

1. The answer was a general denial. The plaintiff's testimony, if true, established the making of a contract. The defendant denied the conversation at which the plaintiff alleged the contract was made, but admitted that at another time and place the plaintiff had proposed such an agreement, to which he had replied that he would do what was right. He testified that he later heard through a third party that the plaintiff expected him to divide the commission if he made the sale, and that he thereupon went to the plaintiff and disclaimed the making of any such contract, and notified him that he would not divide

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the commission in case he himself made the sale, nor would he expect the plaintiff to divide with him in case he made the sale. This was repeated several times, the plaintiff in each instance insisting upon the performance of the contract as made. The district court took the view that the contract as alleged by the plaintiff was valid, but a contract from which either party would have a right to withdraw upon notice before sale; and on the subject of withdrawal instructed the jury, in substance, that the agreement set out in the petition was supported by a consideration and was a valid contract, but would be such a contract as either party would have the right to withdraw from upon notice before sale; and, if the jury believed from the evidence that the defendant did withdraw from such contract before sale, and gave the plaintiff notice of such fact, it should find for the defendant; but that the defendant would be required to act in good faith, and the withdrawal must have been in good faith and before the sale of the land was made by the defendant. The defendant contends that the verdict was contrary to this instruction. He argues that there was no dispute as to the fact of the defendant's actual withdrawal, and no evidence that he did not make the same in good faith. Assuming, for the purpose of determining this question, that the law was correctly embodied in the instruction, we think there is evidence upon which the verdict of the jury may be sustained. If this defense was proper to go to the jury, the defense of withdrawal was an affirmative one, and the defendant was bound to establish it by a preponderance of the evidence. Strictly speaking, the evidence fails to show a withdrawal, and a rescission of the contract. What the defendant did, according to his own testimony, was to deny its existence and notify the plaintiff that he would not perform it. But, be this as it may, still, assuming that the defendant had the right to withdraw upon reasonable notice and in good faith, it was for the jury, under this instruction, to determine what constituted reasonable notice, and from the evidence to decide

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whether the action was taken in good faith. While the district judge did not define the elements of good faith in this transaction, we think it was fairly to be inferred that for the act to be in good faith it must have been performed before there had been any change in the condition of the subject matter of the contract, and before the defendant had any reason which he did not have at the time of the making of the contract to suppose that he, and not the plaintiff, would make the sale. We have carefully read the evidence. It does not establish the fact of withdrawal in good faith so clearly that it should have been determined by the court as a matter of law.

2. After the jury had retired and was considering its verdict, one of the jurors stated in the presence of his fellow-jurors that he was acquainted with Allen, the owner of the farm sold by the defendant, and for the sale of which the plaintiff was seeking to recover half the commission, and that about Christmas, 1905, Allen had told him that he had practically sold the farm. It is contended by the defendant that this statement tended to influence the minds of the jurors upon the question of good faith on the part of the defendant. It is conceded that the question of good faith was not in issue; and the plaintiff contends that, if this statement tended to or did influence the minds of the jurors, it was upon a question which was wholly foreign to the issue, and was therefore error without prejudice and should be disregarded. The defendant insists that, the question having been submitted to the jury, it must be considered as material in determining whether its verdict shall stand. He invokes the doctrine that, upon an application to set aside the verdict of a jury on the ground that it is contrary to the instruction of the court, the question whether such instruction correctly states the law will not be considered. It is a fundamental principle which is at the basis of jury trials, and never to be lost sight of, that the court is to decide all matters of law, and the jury all disputed facts. To maintain the function of the court to determine matters of law, it is essential

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that the jury should take the law from the court; and, whenever it appears that the jury has clearly disregarded the law as laid down by the court, its verdict should be set aside, even though its construction of the law was correct, and that of the court mistaken. *Meyer v. Midland P. R. Co.*, 2 Neb. 319; *Aultman & Co. v. Reams*, 9 Neb. 487; *Omaha & R. V. R. Co. v. Hall*, 33 Neb. 229; *Standiford v. Green & Co.*, 54 Neb. 10; *World Mutual Benefit Ass'n v. Worthing*, 59 Neb. 587. This is necessary to the due and orderly administration of the law. To allow the jury to review, or even correct, the law as given to it by the court would lead to inextricable confusion and consequent injustice. The rule should go no further, however, than the reason therefor demands. In the case we are considering, there was no contumacy of the jury, and no disposition shown to disregard any rule of law laid down by the court; and the setting aside of its verdict would not vindicate nor tend to vindicate the right of the court to decide a question of law. In determining whether the question, the decision of which may have been improperly influenced by the indiscretion of the juror in stating facts within his own knowledge, was material, we are not bound by the opinion of the district judge at the time of his giving the instruction named. If the fact was really immaterial, and was so regarded by the trial judge when he came to consider the question upon a motion for a new trial, then we are at liberty to apply the principle that harmless error will be disregarded.

We therefore recommend that the judgment of the district court be affirmed.

FAWCETT and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHARLES O. WHEDON, APPELLEE, v. LANCASTER COUNTY ET
AL., APPELLANTS.

FILED FEBRUARY 6, 1908. No. 15,348.

1. **Appeal: DISMISSAL.** Where the appeal of the original appellant, properly taken from a decree in equity, necessarily determines all of the questions presented by the record and disposes of the case on its merits, a motion to dismiss as to other appellants will not be considered.
2. **County Board: BRIDGES: CONTRACTS.** Under the statute authorizing the county board to make yearly contracts for the construction of all bridges, such contracts may not be made for a shorter period than one year; nor may the county board evade the provisions of the statute by terminating before its expiration a contract made for one year.
3. ———: ———: ———. Where the county board has a yearly contract for the construction of all bridges in the county, it may not make another to take effect before the expiration of the first; but it may, if the occasion for building a bridge arises during the life of the yearly contract, require it to be done thereunder, even though the same cannot be completed within the term thereof.
4. ———: ———: ———: **DAMAGES.** Where a county board has entered into a contract for the construction of bridges for the period of one year, and before the expiration thereof attempts to supersede the same with a contract much less favorable to the county, damages to the taxpayers will be presumed.
5. **Appeal: PLEADINGS.** This court will not consider on appeal facts not presented by the pleadings.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Affirmed.*

Strode & Strode, T. J. Doyle, F. M. Tyrrell and C. E. Matson, for appellants.

Charles O. Whedon, pro se.

CALKINS, C.

Under the provisions of the act of 1905 (Comp. St. 1905, ch. 78, secs. 83-85p) the county board of Lancaster county

on April 26, 1906, entered into a contract with one Charles G. Sheeley for the construction of all bridges that might be required to be built in said county within the period of one year from that date. After the completion of a large number of bridges under this contract the county board, on the 5th day of January, 1907, entered upon the record of its proceedings of that day that the contract in question "is hereby canceled by mutual consent," and on the same day caused to be indorsed upon the contract itself the words "this contract is hereby canceled by mutual consent," which indorsement was signed by the chairman of the board and by the agent of the contractor. Following this action the board, after advertising for bids and finding that the proposal of the defendant, the Nebraska Construction Company, was the lowest and best bid, awarded to it a contract for building all bridges that might be required to be built in the said county during the term of one year from the 1st day of March, 1907. It appears that the prices of both material and labor had advanced between the date of the execution of the contract of April 26, 1906, and the cancelation of the same, and that the cost to the county under the new contract would be much greater for the same kind of work than under the contract made in 1906. On the 2d day of March, 1907, the plaintiff, a taxpayer and landowner of Lancaster county, brought this action against the county board and the Nebraska Construction Company to enjoin them from proceeding under the new contract, upon the ground that the said board was without power to terminate the contract of 1906, and that in so doing its members were actuated by improper and corrupt motives. The court below granted the injunction prayed for, and from its judgment this appeal is brought.

1. It appears that, when this suit was brought the members of the county board and the county attorney did not agree as to the policy which should be adopted in defending the same; and the county board, acting in pursuance of the provision of the statute authorizing it to employ addi-

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tional counsel when requested so to do by petition signed by ten freeholders (Comp. St. 1905, ch. 7, sec. 18), designated other counsel to conduct the defense of this cause. Thereupon the county attorney intervened on behalf of the county in a petition in which he practically joined the plaintiff in the charges made by him and in demanding the relief prayed for. When the case came to this court, it was upon the appeal of the defendant, the Nebraska Construction Company. The county board afterwards filed a separate appeal, which the county attorney moved to dismiss. This was denied, and a motion for a rehearing of this order was submitted with the main case upon the argument. The case having been submitted, it is unnecessary to determine whether the appeal of the county board was authorized or properly made. Under the provisions of the statute of 1903 (code, sec. 681a), we are practically required to hear *de novo* all appeals from decrees in equity cases, and to render or direct the rendition of such judgment as in our opinion the court below should have entered. The question presented by the appeal of the defendant, the Nebraska Construction Company, cannot be determined without determining the question raised by the appeal of the county board. If the Nebraska Construction Company had dismissed its appeal before the submission of the case, then the question might have arisen; but, as the case now stands, it is not involved.

2. The excuse of the county board for terminating a confessedly advantageous contract nearly four months before its expiration was that the season's work was practically over, and that the board desired to let the contract for the ensuing year at a date early enough to enable the new contractor to prepare himself for beginning work in the spring. This end might have been attained by negotiating for the new contract before the expiration of the old one. This suggestion is met by the statement that a former county attorney had advised the board that it was better to cancel an existing contract before advertising for new proposals, and that the board believed it to be neces-

sary to terminate the old contract before it could take steps for the making of a new one. It is also suggested that the price of material was rapidly advancing, and that the board believed more favorable prices could be secured by an early letting of the contract. The district court exonerated the members of the county board from any intentional wrongdoing; and, in the view we take of the powers of the county board, it is not necessary for us to determine whether the excuses presented by it for its action are sufficient to overcome the inference that would naturally arise from its conduct unexplained. The action of the board in terminating the contract of April 26, 1906, on January 5, 1907, was by it denominated a cancellation, and it has been so spoken of in the argument of counsel. We regard the use of the term cancellation as inaccurate and likely to be misleading. To cancel is to annul and destroy. The cancellation of a contract necessarily implies a waiver of all the rights thereunder by the parties. If, after a breach by one of the parties, they agree to cancel it, that is a waiver of any cause of action growing out of the original breach. *Dreifus, Block & Co. v. Columbian Exposition Salvage Co.*, 194 Pa. St. 475, 75 Am. St. Rep. 704. The contract had been in force for some 9 months, and a large amount of work had been performed under it. It is plain that the parties did not intend to cancel the contract in the true sense of that word. What they meant to do, and what they did do, if it was within the scope of the power of the county board, was to change the contract with respect to its duration. The question presented by the record is not whether a county board may cancel a contract of this character, but whether it can change the period of duration of the yearly contracts provided for by the act of 1905 (Comp. St. 1905, ch. 78, sec. 84). It is argued that the unmaking of a contract is within the power which made it, and is equally effectual. This is true when applied to natural persons, and it may be true when applied to corporate officers having a general power to contract; but, when the power to contract is granted to public

officers with accompanying restrictions and limitations as to the manner in which it is to be exercised, the power must be exercised within the limits of these restrictions. In the statute which we are considering, the board is authorized to make yearly contracts for all bridges to be built within their respective counties for the period of one year, at a specified sum per lineal foot for the superstructure, and at a specified sum per foot, board measure, for the wood material used in the substructure of such bridges. Having chosen to proceed under this power, the board has accepted the limitations imposed by the statute. The period for which it may make this contract has been fixed by the statute, and all bridges built within the period must be built under this contract. The county board may not let the contract for a greater period, nor for a less, than is prescribed by the statute. This is not only conceded by the defendants, but is insisted upon in their argument. To make a contract for a year, and terminate it at the end of 8 or 9 months, would be to do indirectly what the board might not do directly, and this cannot be permitted. We therefore conclude that the action of the board attempted to be taken on January 5, 1907, was without authority and void.

3. It is apparent that the county board cannot have, with different parties, two yearly contracts, any portion of which covers the same period, and that, if the contract expiring April 26, 1907, was in force on the 2d day of March in that year, the county board had no power to enter into the contract with the defendant, the Nebraska Construction Company, to begin on the latter date. It is urged that on March 2 the contract expiring April 26 was practically ended, and that no necessity for any further work thereunder was likely to arise, and that, if such necessity did occur, the contractor could not be compelled to undertake any work which he might not be able to complete within the year. We do not think the statute susceptible of any such construction. The purpose of the law was to have a contract in existence for a year, under which work.

the necessity for which should arise during that period, could be performed. If the occasion for building a bridge arose during the life of this contract, the work should be ordered and done thereunder, and the circumstance that the completion of the work might require a time beyond the period of the yearly contract is immaterial. Any other construction of yearly contracts would imply an interregnum, in which no work could be ordered nor begun, lest it might not be completed within the year. The contract would therefore be, not for a year, but for some shorter and indefinite period. It therefore follows that the county board had no authority to enter into the contract of March 2, 1907, with the Nebraska Construction Company.

4. The defendants contend that the plaintiff has failed to show damage in common with the taxpayers of the county by reason of an unnecessary expenditure of the public funds, and argues that, if no other work would have been done under the contract expiring April 26, 1907, it was a matter of indifference to the taxpayers whether it was allowed to stand until it expired or not. We think the plaintiff had the right, on the 2d day of March, 1907, to assume that the necessity for work might, and probably would, arise before the 26th day of April, and that it would, in default of any action taken by him, be done under the contract entered into on the 2d day of March. The prices under this contract being very much higher than under the contract expiring April 26, damage would necessarily and naturally result to the taxpayers of the county. The fact that no such work was done may properly be attributed to the injunction obtained by the plaintiff in this action.

5. It appeared from the evidence that at the time of the making of the Sheeley contract on the 26th day of April, 1906, there was existing a former contract with the same parties, which would not have expired by its own limitation for about 15 days, but which the board had assumed to terminate before that date. It was contended

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upon the oral argument that, if the board has no power to terminate such contract until the end of its term, then the contract of April 26, 1906, was void, and, being invalid, it left the county board free to make the contract with the defendant, the Nebraska Construction Company. That these facts were not pleaded is a sufficient answer to this argument. Whether, if pleaded, they could be used by the defendants to defeat the plaintiff's right to the relief demanded, it is not necessary for us to determine.

We therefore recommend that the judgment of the district court be affirmed.

FAWCETT and AMES, CC., concur.

By the Court: For the reasons set forth in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ERNEST S. KENNISON V. STATE OF NEBRASKA.

FILED FEBRUARY 20, 1908. No. 15,154.

1. **Homicide: MALICE: PRESUMPTIONS: INSTRUCTIONS.** The law implies malice in cases of homicide if the killing alone is shown. but, if the circumstances attending the homicide are fully testified to by eye-witnesses, it is error to instruct the jury that there is a presumption of malice from the fact of the killing or from the use of a deadly weapon. *Vollmer v. State*, 24 Neb. 838; *Lucas v. State*, 78 Neb. 454.
2. —: **INTENT: INSTRUCTIONS: QUESTION FOR JURY.** Where the evidence of eye-witnesses shows that during or immediately after a fist fight between the deceased and the defendant, in which the defendant was being worsted, the defendant shot at, but missed, the deceased, and that the fatal shot was fired almost immediately thereafter during a struggle between them for the possession of the revolver, an instruction which assumes the crime to be murder in the second degree is erroneous, since it is for the jury to determine from all the evidence before them the intent with which the shooting was done.
3. —: **INSTRUCTIONS: BURDEN OF PROOF.** An instruction that,

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"if the jury believe from the evidence that the defendant unlawfully and feloniously shot deceased, Samuel D. Cox, and that said shot caused the death of said Cox, then, to reduce the killing from murder to manslaughter, the jury must believe beyond a reasonable doubt" that certain mitigating circumstances recited therein existed, assumes that, if the defendant unlawfully killed the deceased he was guilty of murder, and places the burden upon him to establish beyond a reasonable doubt the existence of mitigating circumstances before the jury would be entitled to "reduce the killing" from murder to manslaughter.

4. ———: ———: ———: PRESUMPTIONS. An instruction which, if the killing is shown, assumes the crime to be murder, and requires proof of a lower degree to be made by the defendant beyond a reasonable doubt before the jury will be justified in reducing the degree to manslaughter, is inconsistent with instructions that the burden of proof in a criminal case never shifts, but remains with the state throughout the trial, and that the defendant is presumed to be innocent until proved to be guilty beyond a reasonable doubt.
5. Criminal Law: INSTRUCTIONS: BURDEN OF PROOF. An instruction which requires a defendant to prove beyond a reasonable doubt his innocence of a graver crime before he can be found guilty of a less heinous offense imposes an unwarranted burden upon the defendant and is erroneous.

ERROR to the district court for Scott's Bluff county:
HANSON M. GRIMES, JUDGE. *Reversed.*

Hamer & Hamer and M. J. Huffman, for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin*, *contra.*

LETTON, J.

An information was filed in the district court for Scott's Bluff county, in which plaintiff in error was accused of murder in the first degree in killing Samuel D. Cox by shooting him with a pistol held by plaintiff in error. A jury trial was had, which resulted in a verdict of guilty of murder in the second degree, with recommendation that

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the extreme penalty of the law for that degree be inflicted. The judgment of the court was that plaintiff in error be confined in the state penitentiary for the period of twenty-four years. The record is quite voluminous, and a number of errors are assigned, but in view of the conclusion which we have reached, and of the fact that the case will have to be again tried, it will not be necessary, nor would it be proper, for us to review the evidence or discuss the merits of the case as shown thereby. Motions were filed seeking a continuance of the cause, and also for a change of the venue to another county. Both were overruled, and complaint is made of the ruling on each motion. Both were supported by affidavits, and resisted by counter affidavits. In the rulings upon these motions we can discover no abuse of discretion, and are of the opinion that both motions were properly overruled. There is some complaint that the verdict was not supported by sufficient evidence, and that under the proofs it should have been an acquittal or, at most, not greater than manslaughter. We have carefully considered all the evidence introduced upon the trial, and think the verdict cannot be successfully assailed on that ground.

The defendant complains of the giving of the ninth instruction, given by the court upon its own motion. That part of the instruction complained of is as follows: "In cases of homicide, the law presumes malice from the unlawful use of a deadly weapon upon a vital part, and when the fact of unlawful killing or shooting causing death is proved, and no evidence tends to show or express malice on the one hand, or any justification, mitigation or excuse on the other hand, the law implies malice, and the offense is murder in the second degree. In law, a loaded gun or pistol is a deadly weapon, and if you believe from the evidence beyond a reasonable doubt that the defendant, Ernest S. Kennison, wantonly, cruelly and without justification or excuse shot Samuel D. Cox, and thereby caused his death, then the law presumes that such shooting was done maliciously, unless you are satisfied by the evidence

that it was done without malice." This instruction is in accordance with the ancient doctrine of the common law, which, after the fact of a killing was shown, imposed upon the defendant the burden of proving justification or excuse. This doctrine, however, has in this and other states long given place to the more modern and logical idea that the burden of proof in a criminal case does not shift, but remains with the state until the end of the trial, and that it is incumbent upon the state to prove beyond a reasonable doubt that the defendant's act was actuated by malice at the time the fatal shot was fired. Where no direct evidence is obtainable as to the circumstances immediately surrounding the killing, and the fact that the defendant killed another is proved, there is an inference that the killing was intentionally done. This inference arises from the nature of the circumstances, since it would be contrary to human experience to believe that the act was done without motive. If the killing was done, in fact, unintentionally or by accident, or if there existed justification or excuse for the same, the person who committed the act, in the absence of any witness, would be the only person who could furnish such evidence, hence, in such case, when the fact of the killing by a known person with a deadly weapon is proved, the inference or presumption arises that the killing was done intentionally, this being a rule of evidence founded upon the necessities of the case. But where all the circumstances surrounding the killing are testified to by witnesses, and the testimony of some of them would warrant the jury in finding that the killing was malicious, while the testimony of others, if believed, would warrant the jury in the conclusion that the fatal shot was fired by accident or in self-defense, then no presumption is to be indulged in. 1 Elliot, Evidence, secs. 90, 91, 98. The facts are all before the jury, and it is for them to say whether the killing was malicious, whether it was upon a sudden quarrel or in the commission of an unlawful act, or whether it was justifiable and excusable on the ground of self-defense or other equally valid rea-

sons. It is unnecessary at this time to enter into a full discussion of the history of the legal doctrine under discussion. The old and the new doctrines are set side by side in the opinion of Justice Shaw in *Commonwealth v. York*, 9 Met. (Mass.) 93, and the dissenting opinion of Judge Wild. See, also, Wharton, Criminal Evidence (8th ed.), secs. 738, 764; Wharton, Homicide (3d ed.), sec. 478; *Territory v. Lucero*, 46 Pac. (N. M.) 18, in which there is a full discussion of the conflicting doctrines, with many cases cited; *Territory v. Gutierrez*, 79 Pac. (N. M.) 716. The law was settled nearly twenty years ago in this state on this point in the case of *Vollmer v. State*, 24 Neb. 838, in which it is said in the opinion by Chief Justice REESE, speaking of the following instructions: "You are instructed that, where the fact of the killing is established without any excuse or explanatory circumstances, malice is presumed, and the crime would be, under such circumstances, murder in the second degree." This instruction is objected to as not being applicable to the case made, and as being prejudicial, and as tending to direct the attention of the jury to that particular quality of homicide. This instruction is perhaps based upon *Preuit v. People*, 5 Neb. 377; *Milton v. State*, 6 Neb. 136. The doctrine contained in the instructions, when applied to a case in which nothing further than the killing is shown, is recognized by this court in the case cited, and in some others, but we think it can have no application to cases like the one at bar. All the circumstances of the killing are shown by those who were eye-witnesses. * * * Plaintiff in error was indicted for murder in the second degree. It was for the jury to say, from all the circumstances of the case, whether the killing was murder in the second degree, manslaughter, or excusable. When all the facts and circumstances connected with the killing were presented to the jury, it was for them to say whether plaintiff in error purposely and maliciously killed the deceased, or whether the killing was unlawful, without malice, upon sudden quarrel, or unintentionally done (as testified to by plain-

tiff in error upon the stand), while the slayer was in the commission of some unlawful act, which would be manslaughter, or whether in self-defense under a reasonable apprehension of danger to life, or great bodily harm, which would be excusable." Ten years later in the case of *Kastner v. State*, 58 Neb. 767, an instruction almost word for word identical with that in this case, except for the change of names, was given, and complained of by the defendant. After stating the rule in this court as laid down in *Preuit v. People*, and *Milton v. State*, *supra*, the court says, speaking of the *Vollmer* case: "In that case all the circumstances surrounding the transaction had been detailed before the jury by those who were present, and saw and heard what transpired. Extenuating facts were proven tending to show want of malice and that life was taken in self-defense. Manifestly the instruction given in that case, that malice was presumed from the facts of the killing and that the crime was murder in the second degree, was highly prejudicial to the defendant. But in the case at bar no person witnessed the shooting other than Tiedeman, whose life was taken. * * * Had the proofs adduced been of such a character as to make it appear that the killing of Tiedeman was either justifiable or that the offense committed was below murder in the second degree, then the instruction criticised would have been misleading and prejudicial." The same rule was again asserted in *Lucas v. State*, 78 Neb. 454, in which the question is reexamined by Chief Justice SEDGWICK, and the rule laid down in *Vollmer v. State*, *supra*, adhered to.

It will thus be seen that it has been the settled law of this state, since the question was first presented to this court for consideration, that in a case of homicide, where all the circumstances surrounding the transaction are in evidence before the jury, the fact of the killing gives rise to no presumption that it was done with malice, but it is for the jury to determine the motive or intent or lack of intent with which the act was done. In Good and Corcoran, *Instructions to Juries*, p. 309, this instruction is

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set out at length, and the case of *Kastner v. State, supra*, is cited in support thereof. As we have shown, that case upholds its applicability in cases where the circumstances surrounding the killing are not in evidence, but it expressly upholds the doctrine of the *Vollmer* case that such an instruction is erroneous where all the facts are in evidence by eye-witnesses.

In this case the tragedy occurred about dusk on the principal street of the village of Minatare in the immediate presence of a large number of eye-witnesses. The evidence is to the effect that the shooting took place at the termination of a fight with fists between Kennison and Cox, in which Kennison had received the worst of the encounter. Kennison had been struck by Cox and knocked against the wall of a building. He recovered himself, drew a pistol and shot at Cox who, as a number of witnesses testify, was then standing still, six or eight feet away from him. This shot missed Cox. Cox then rushed toward Kennison, evidently to try to get the pistol, when a second shot struck his left arm. The shot which killed him followed during the struggle between them for the possession of the revolver. According to some of the witnesses for the state, the last shot was fired deliberately. The witness Pierpont, who was called on behalf of the state, testified as follows: "Q. As he pulled the gun, you say the first shot went wild? A. I think so. Q. Then what did Cox do? A. He clinched or reached for Kennison's arm. Q. Did you notice whether he got it or not? A. Yes, he got him by the wrist. Cross-examination: Q. You say Cox caught him either by the gun or the wrist? A. By the wrist, I think. Q. Might Cox have had hold of the gun at any time? A. He might have had, but I don't think he had." Other witnesses for the state told of Cox having hold of Kennison's arm or wrist in the struggle. Kennison testifies that Cox rushed at him before he fired the first shot, that this did not stop him, that Cox grabbed him, took hold of his arm and pushed his hand up, and that the gun was discharged accidentally. The witness Snell, who testified for the

defendant, swore that Cox had hold of Kennison's hand in which the gun was held, and that after he got hold of the hand with the pistol Cox threw the hand up that had the gun in it and the gun went off.

With all these facts before the jury, the use of the weapon or the fact of killing raised no presumption of malice, and the question of its absence or existence was one for the jury to determine from the evidence under proper instructions.

The defendant complains also of the tenth instruction, given by the court upon its own motion. The portion of that instruction which is claimed to be erroneous is as follows: "And in this case, if the jury believe from the evidence that the defendant unlawfully and feloniously shot deceased, Samuel D. Cox, and that said shot caused the death of the said Cox, then, to reduce the killing from murder to manslaughter, the jury must believe beyond a reasonable doubt that the provocation for such shooting arose at the time of the shooting, and that the passion therefor was not the result of a former provocation; that such passion was either rage, anger, sudden resentment, or terror, which rendered the defendant incapable of cool reflection upon the character and result of his act, and that the act or shooting was directly caused by passion arising out of the provocation at the time of the shooting, if there was any provocation therefor shown by the evidence." This instruction in effect tells the jury that, if they believe that the defendant unlawfully and feloniously killed Cox, the killing is murder, and in order to reduce the killing from murder to manslaughter the jury must believe *beyond a reasonable doubt* that the mitigating circumstances detailed in the instruction existed, thus placing the burden upon the defendant to prove the existence of circumstances which would lower the degree of the crime. If the unlawful killing is shown, by the instruction the degree of the crime is assumed to be murder, unless the existence of provocation at the time, and passion caused thereby, was proved beyond a reasonable doubt,

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that is, the higher degree of the crime must stand as established, unless it is affirmatively established on the part of the defendant *beyond a reasonable doubt* that mitigating circumstances existed, which would lower the degree of the crime, or "reduce the killing," as the instruction states, "from murder to manslaughter." Under our statutes, if the defendant unlawfully and feloniously shot and killed the deceased, he might be guilty of either murder or manslaughter, since both of these crimes are felonious, but the instruction in effect tells the jury that he is guilty of the higher degree of the crime, unless he can prove his innocence of that degree beyond a reasonable doubt. This instruction invades the province of the jury, and is clearly wrong. It deprives the jury of the right to fix the degree from the evidence produced by the state, and it imposes an unwarranted burden upon the defendant. We have repeatedly held in this state that the burden of proof in a criminal case never shifts, but remains with the state throughout the trial. An instruction which places this burden upon the defendant, or which requires him to prove beyond a reasonable doubt his innocence of a heavier degree of crime, is highly prejudicial. Counsel for the state insist that this instruction, when taken in connection with the remainder of the charge, is not erroneous, and refer to the case of *Kemp v. State*, 13 Tex. App. 561, in which the word "reduce" was used by the court in much the same manner as in the instruction complained of, but the instruction in the *Kemp* case did not require the jury to be convinced beyond a reasonable doubt that mitigating circumstances existed before they would be justified in reducing the killing from murder to manslaughter.

It is contended also by the state that, as other instructions were given in which the different degrees of the crime of felonious killing were well and fully defined, the vice of this instruction, was fully corrected. But this could not be. An instruction that is clearly wrong, and which is inconsistent with the correct rule, is not cured

by a good one. This is too well settled to require citations of authorities.

In the sixth instruction, the jury were told that the burden of proof rests upon the state to prove the charge beyond a reasonable doubt, and that this burden never shifts from the state to the defendant; but this is inconsistent with an instruction which tells the jury that, in order to reduce the crime from murder to manslaughter, certain elements must be proved beyond a reasonable doubt. The eleventh instruction also is inconsistent with this one, and the necessary result of the two instructions, taken together, would be to confuse the jury, and leave them in doubt whether merely a reasonable doubt as to his guilt of murder in the second degree would be sufficient to warrant them in fixing the degree of the crime at manslaughter, or whether it would require them to be convinced *beyond* a reasonable doubt that mitigating facts existed, before they would be justified in reducing the degree, and finding him guilty of the lesser offense, instead of the greater.

The ninth instruction complained of sets against the defendant the presumption of malice, and of murder in the second degree; the tenth assumes the existence of that degree of murder, and requires proof of a lower to be made by the defendant beyond a reasonable doubt before the jury will be justified in reducing the degree. Under the testimony in the case, these instructions were prejudicially erroneous.

The constitution guarantees a fair and impartial trial to every citizen of this state, and this demands that in the consideration of the evidence the jury must be guided in their deliberations by a correct statement of the law. It was one of the constitutional rights of the defendant that no instructions should be given the jury which would impose upon him a burden to which he was not legally subject, and the effect of which would be to prevent him from having a fair and impartial trial under the law of the land.

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For these reasons, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

JOSEPH SKIDMORE v. STATE OF NEBRASKA.

FILED FEBRUARY 20, 1908. No. 15,238.

1. **Criminal Law: VARIANCE.** A party charged as a principal cannot be convicted upon evidence tending only to show that he was an accessory.
2. ———: **ACCESSORY.** One who advises others to commit larceny, but who is several miles distant at the time of the commission of the offense, and who takes no part therein, but assists in the disposal of the proceeds after the theft has been fully committed, is not a principal, but an accessory.

ERROR to the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

R. R. Dickson, for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin*, *contra*.

LETTON, J.

The defendant, Joseph Skidmore, was charged with stealing nine hogs on the 25th day of February, 1907, the property of one John Ferguson. Upon trial he was found guilty and sentenced to the penitentiary.

Ferguson resided in Iowa, but owned a ranch in Holt county, about twelve miles from the village of Atkinson. He employed a young man named Kimball to occupy the ranch and take care of the property. The evidence of the state, which was evidently believed by the jury, is about as follows: The defendant, Skidmore, had been employed by Ferguson upon the ranch in the same capacity as Kimball until December, 1906, the time that Kimball took

charge. On the day the property was stolen Kimball went to Atkinson, attended a show there, and remained over night. On several occasions before the night of the offense Skidmore had talked with three young men named Weller, Purnell and McShane, suggesting the theft of the hogs from the Ferguson ranch. On the day before the night that the hogs were taken he told Weller that Kimball was in town at the show, and that he, Skidmore, would procure a wagon from one Kazada and a team with which they could get the hogs that night. He made arrangements with McShane for the use of his team, and between 8 and 10 o'clock that night McShane, Weller and Purnell, using McShane's team and Kazada's wagon, left Atkinson for the Ferguson ranch. They went to the ranch, loaded nine hogs, and brought them to Atkinson, reaching there just before daylight. Purnell went to Skidmore's house to notify him of their arrival. Skidmore then joined them and went with them to the stock-yards of one Dibble, a butcher and stock buyer, where Skidmore helped to unload the hogs. Dibble some time during that day paid Skidmore for the hogs, and Skidmore paid Weller and McShane \$16 each as their share of the proceeds. The defense is that the hogs were procured through Skidmore's agency in the manner detailed for the benefit of Kimball, who received a part of the money for them, and that Skidmore was merely his innocent agent in the matter. Kimball had sold some hogs without authority before this. The jury evidently believed that the defendant planned the theft and took part in it, and there is sufficient evidence to uphold the verdict if the proper crime had been charged.

The court instructed the jury, in substance, that, if the defendant requested, instigated and procured the three men to steal the hogs, and that pursuant to such procurement they took the hogs, brought them to Atkinson, and that they were there sold by defendant with the felonious intent to steal the hogs and deprive the owner of his property, then the defendant would be guilty as charged. In many states the old common law distinction between

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principals and accessories before the fact has been abolished by statute. This seems to be a step in the general direction of reform by simplifying the law and abolishing technicalities; but the legislature of this state has seen fit to abide by the ancient and technical distinctions. Mr. Wharton says: "The obstructions of justice caused by these subtleties have long been deplored." 1 Wharton, (Criminal Law (10th ed.), 205. In this state aiding or abetting or procuring another to commit a felony is a substantive and independent crime. Criminal code, sec. 1; *Oerter v. State*, 57 Neb. 135; *Casey v. State*, 49 Neb. 403; *Dixon v. State*, 46 Neb. 298; *Lamb v. State*, 69 Neb. 212. Since a person cannot lawfully be convicted of a crime other than that with which he is charged, it is clear that, if from the facts related Skidmore was an accessory before the fact, he could not lawfully be convicted of the larceny itself. Unless the defendant was actually or constructively present at the time of the commission of the offense, he could not be held as principal, but, if he aided, abetted or procured the commission of the crime, he could properly be convicted as an accessory. Since he was not actually present, the question arises: Was he constructively present? "A person is constructively present, and therefore guilty as a principal, if he is acting with the person who actually commits the deed in pursuance of a common design, and is aiding his associate, either by keeping watch or otherwise, or is so situated as to be able to aid him, with a view, known to the other, to insure success in the accomplishment of the common enterprise." Clark and Marshall, Law of Crimes (2d ed.), sec. 173. *Breese v. State*, 12 Ohio St. 146. "But persons not actually assisting are not principals at common law. * * * And, although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offense is committed, are not principals in cases where the felony is immediately executed by responsible agents, but are accessories before the fact." 1

Wharton, Criminal Law (10th ed.), sec. 219. In order to be a principal, therefore, it is essential that the party charged, where the act is committed by confederates, take some part in the execution of the plan. *State v. Valwell*, 66 Vt. 528, 29 Atl. 1018. In most of the cases cited by the state where a conviction as principal was upheld, the defendant had in some way taken part in the execution of the common design at or about the time of the commission of the felony. The case of *Scales v. State*, 7 Tex. App. 361, cited by the state, has virtually been overruled in the later Texas cases, which are now in harmony with the general rule. In *Holmes v. State*, 49 Tex. Cr. Rep. 348, 91 S. W. 588, the rule is stated thus: "In felony cases in order to constitute one a principal he must be present or doing some act at the time in furtherance of and in assistance to the principal." *Barnett v. State*, 46 Tex. Cr. Rep. 458, 80 S. W. 1013; *McDonald v. State*, 46 Tex. Cr. Rep. 4, 79 S. W. 542.

In *Lamb v. State*, *supra*, the facts were that Hill and Stewart stole cattle and drove them to a railroad stock-yard at Lamb's instigation and procurement. Lamb, soon after, brought some of his own cattle to the stock-yard, mingled them with the stolen cattle, shipped and sold the whole number and appropriated the proceeds. It was contended that the refusal of the court to tell the jury that defendant could not be convicted if he was a principal in the second degree was error, but the court said: "The refusal of the court to tell the jury that defendant could not be convicted if he was a principal in the second degree was not error. There is, in our opinion, no evidence tending to prove that Lamb was present when the cattle were stolen, or that he was near enough to give aid or encouragement in the perpetration of the crime." The court also said: "The law of the case is very plain. If the cattle were stolen as alleged, and if Lamb was an accessory before the fact, that is, if by his command, request, advice or suggestion the crime was committed when he was neither actually nor constructively present, he was an

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aider, abetter or procurer within the meaning of the statute above quoted." The facts in this case are very similar. The three young men stole the hogs and took them to a place where the defendant sold them. The defendant was not with them at the time they started on the trip, nor until after the theft had been accomplished. He was never nearer the scene than Atkinson. He took no part in enticing Kimball away or keeping watch of him, or in anything connected with the doing of the act itself. The crime was fully committed before he saw the hogs. What he did was to aid, abet and procure the others to steal the hogs. He was neither actually nor constructively present. The instruction was therefore erroneous.

He was indicted for one crime and convicted of another. This cannot lawfully be done. *Hill v. State*, 42 Neb. 503; *Dixon v. State*, *supra*.

The judgment of the district court is

REVERSED.

MCCAGUE SAVINGS BANK, APPELLANT, v. FANNIE M. CROFT
ET AL., APPELLEES.

FILED FEBRUARY 20, 1908. No. 15,009.

1. **Abatement and Revival: PARTIES.** Where the transfer of the subject of an action is made by the plaintiff during its pendency, the action may be prosecuted for the benefit of the assignee in the name of the original plaintiff, such party remaining *in esse*.
2. ———: ———. The insolvency of, and the appointment of a receiver for, the original plaintiff, who has assigned the cause of action prior to the appointment of a receiver and since the action was begun, does not prevent the prosecution of the action in the name of the original plaintiff.
3. **Action: JOINDER.** An action to foreclose a mortgage cannot, against objections made by the defendant, be joined with an action to obtain a money judgment upon a note not secured by the mortgage.
4. **Pleading: MISJOINDER: DISMISSAL.** In case of misjoinder of two causes of action in the same petition, the plaintiff may dismiss one of such causes of action and proceed to trial upon the other.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

Hall & Stout and Charles Battelle, for appellant.

John L. Webster, Joel W. West and John O. Detweiler, contra.

DUFFIE, C.

On April 28, 1894, plaintiff filed its petition herein, alleging that on the 24th day of March, 1892, the defendant Fannie M. Croft executed and delivered to the defendant John B. Finlay her promissory note for \$5,000, due one year after date, and her mortgage securing the same on certain real estate in the city of Omaha; that on April 8, 1892, the defendants Finlay, Manley, Cathers and John W. Croft borrowed from the plaintiff \$5,000, giving their note therefor, due one year from its date; that to secure the same the defendant Finlay indorsed and delivered over to plaintiff the above described note and mortgage given to him by Fannie M. Croft; that defendants Manley, Finlay, Cathers and John W. Croft became liable as guarantors upon the Fannie M. Croft note by signing an indorsement on the back thereof as follows: "April 7, 1892. For value received we hereby guarantee the collection of the within note and payment thereof"; that said note was presented when due for payment, which was refused, and said note was duly protested. Defendants Houska, Stewart and Dodge were made parties because it was alleged that they have, or claim to have, some interest in or lien upon said mortgaged property, junior and inferior to the lien of plaintiff's mortgage. Other usual allegations common in foreclosure proceedings were made. The prayer of the petition was for an accounting of the amount due plaintiff upon the notes described; that it may be decreed that plaintiff have a first lien upon the mortgaged premises therefor; that the defendants Manley, Cathers, Finlay and John W. Croft, or some of them, may be decreed to

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pay plaintiff the amount so found due upon said notes and mortgage; that, in default of payment, the mortgaged premises may be sold according to law, and that, in the event the premises should not sell for a sum sufficient to pay the amount due, plaintiff may have judgment for the deficiency against the defendants Manley, Cathers, Finley and John W. Croft.

Issue was joined upon answers filed by the several defendants now interested, and replies thereto by plaintiff, but the case was not brought to trial until 1906. Before trial defendants Finlay and Fannie M. Croft died, and the action was revived in the names of their successors in interest. July 7, 1905, plaintiff filed a supplemental petition in which it was alleged that at the commencement of the action it was the legal owner and holder of the note dated April 8, 1892, but thereafter for a valuable consideration it sold and assigned the same to one Frank H. Parsons of New York city, for whose benefit this suit is now pending and continued in the name of the plaintiff; that a receiver has been appointed to take charge of the affairs of the plaintiff; that since the commencement of this action the property covered by said collateral mortgage has been taken by foreclosure of prior liens, and that there is no personal liability on the said collateral note and mortgage, so that the security is of no value and there will be nothing therefrom to be applied upon the principal note, and therefore the plaintiff asks nothing by reason of said collateral security; that no part of said note of date April 8, 1892, has been paid, and plaintiff prays judgment against defendants Manley, Cathers, John W. Croft, and J. O. Detweiler as administrator of the estate of John B. Finlay, deceased.

Separate answers were filed by the defendants, appellees herein, in which they deny liability. Plaintiff alleged by way of reply that the transfer of the notes and mortgage to Parsons was made prior to the appointment of a receiver. However, it is unnecessary to set forth fully the answers and replies. A jury was impaneled to try the

case, and plaintiff offered in evidence the note of date April 8, 1892. Objections to its admission were made by defendants Cathers and Detweiler, administrator. The objections were sustained, for the reason, as stated by the court, that plaintiff has no right to prosecute this action for the benefit of the party named in the supplemental or amended petition who is the assignee of the note in controversy. Thereupon the said Frank H. Parsons asked leave of court to be substituted as party plaintiff and that the action proceed in his name. Objection to this request was sustained. Thereupon the trial proceeded as against the defendants Manley and John W. Croft, who were then not present or represented by counsel. Upon the conclusion of the testimony, the court directed the jury to return a verdict against the defendants Croft and Manley for the sum of \$6,198.74, and in favor of the defendants Cathers and Detweiler, administrator. Afterwards the defendant John W. Croft was granted a new trial, which was had to the court without the intervention of a jury, and was determined upon the evidence adduced at the first trial, and resulted in a finding favorable to the said defendant. Judgment was rendered upon the verdict and finding; and plaintiff appeals.

The first of two principal questions presented relates to the authority of the real party in interest to maintain the action in the name of the plaintiff. Section 45 of the code provides: "An action does not abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In the case of a marriage of a female party, the fact being suggested on the record, the husband may be made a party with his wife; and, in the case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the

person to whom the transfer is made, to be substituted in the action." In the event of a transfer of interest by a sale and assignment after the institution of a suit, the action may ordinarily be continued in the name of the original party. *Harrington v. Connor*, 51 Neb. 214; *Howell v. Alma Milling Co.*, 36 Neb. 80, and cases cited.

In the case before us, the plaintiff was the owner of the notes and mortgage when the suits were instituted, but later transferred its interest to Parsons; still later the plaintiff became insolvent, and a receiver was appointed to take charge of its affairs. It is contended by the appellees that the appointment of the receiver suspended the right to further prosecute this action in the name of the bank without obtaining the receiver's consent or making him a party. Thompson, *Commentaries on Law of Corporations*, sec. 6900, says that "the necessary effect of the appointment of a receiver, * * * is to suspend all rights of action, of whatever description, on the part of the corporation." The rule there announced, we think, was intended to apply to cases in which the corporation was the real party in interest at the time of the appointment of the receiver. In such cases it is the practice to have the receiver substituted as plaintiff in actions previously instituted by the corporations. Beach, *Receivers*, sec. 697. But this rule should not control cases where the corporation had, before the appointment of a receiver, sold and transferred its interest in the subject matter of the action. The receiver had no interest in the case. The notes and mortgage were no longer a part of the bank's assets. The appointment of a receiver did not dissolve the corporation; it remained *in esse*. Upon its assignment of the notes and mortgage, the action did not abate, but under section 45, *supra*, continued in the name of the bank to the same extent and in the same manner as the assignee could have maintained it had he been substituted at the time of the assignment.

This brings us to the second question presented. It is urged by appellees that a proper practice will not permit

of the transformation of a suit from one to foreclose a mortgage into an action at law on a promissory note not secured by a mortgage. In the original petition filed by the plaintiff no personal judgment against the makers of the principal note was asked until after the mortgaged property was exhausted, but it was sought to obtain a personal judgment on the principal note, less any amount which might be derived from the mortgaged premises. It is true that, as against objections made by a defendant, an independent note cannot be joined in an action to foreclose a mortgage. Defendants understood that such was the practice, and raised the question, first, by demurrer, and again by answer. When objection is made to a petition on the ground that two causes of action are improperly joined therein, the plaintiff may dismiss as to one cause of action and proceed upon the other, or he may file several petitions, each including such of said causes of action as might be joined, and an action shall be docketed for each of said petitions, and the same shall be proceeded in without further service. Code, sec. 97. A suit upon the principal note of Finlay and upon the mortgage taken by the bank as collateral could not, as against the objections of the defendants, be joined in the same action, but when the plaintiff filed its amended and substituted petition upon which the case was tried, and withdrew any demand for relief on account of the mortgage, it was in effect a dismissal of the cause of action upon the mortgage, and the case then stood for trial upon the principal note declared on; the objection to the petition on the ground of the misjoinder of causes of action being eliminated by the allegations of the amended and substituted petition. As to the defenses raised by the several answers, we are not called upon to pass; the only questions raised by the record are questions of practice, and the merits of the case are not before us. We think the court erred in directing a verdict in favor of the defendants Cathers and Detweiler and finding for Croft, and that the case should proceed in the name of the McCague

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Savings Bank as plaintiff, if the parties interested so elect, or that the assignee of the note may be substituted as the party plaintiff upon the application for such substitution.

We recommend a reversal of the judgment of the district court, and that the cause be remanded for further proceedings not inconsistent with this opinion.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

CHARLES A. SCHAPPEL, ADMINISTRATOR, APPELLEE, v. FIRST NATIONAL BANK, APPELLANT.

AVERY PLANTER COMPANY, APPELLEE, v. FIRST NATIONAL BANK, APPELLANT.

FIRST NATIONAL BANK, APPELLANT, v. CHARLES A. SCHAPPEL, ADMINISTRATOR, ET AL., APPELLEES.

FILED FEBRUARY 20, 1908. No. 15,070.

Contribution: TRESPASS. One who sues for contribution on the ground that he has satisfied a judgment for a trespass committed against a third party must show that the defendant joined in committing the trespass and was liable therefor equally with the plaintiff.

APPEAL from the district court for Pawnee county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

Story & Story, for appellant.

J. C. Dort, contra.

DUFFIE, C.

In February, 1895, Meek, Skinner & Company, doing business in Pawnee City, made and filed a chattel mort-

gage covering all their personal property to secure their creditors, 65 in number. But three of the creditors knew of this mortgage at the time it was filed, and they were the only ones who at that time consented to accept it as security. The First National Bank of Pawnee City, the Avery Planter Company and Maggie Wishard, now deceased, and of whose estate Schappel is administrator, refused to accept the security offered by the mortgage, and commenced actions in attachment against the firm of Meek, Skinner & Company, and these attachments were levied on all the property covered by the mortgage and also on certain real estate in Pawnee City. The attachment of the First National Bank was first levied, that of Maggie Wishard was next in point of time, and that of the Avery Planter Company was levied last. Motions, all based on the same ground, were made to dissolve these three attachments, were heard on the same evidence, and were each overruled. Judgment was entered in favor of the several attachment plaintiffs against Meek, Skinner & Company for the amount of their several claims, and an order for the sale of the attached property made. Meek, Skinner & Company prosecuted error to this court from the order of the district court refusing to dissolve the attachment issued in favor of the First National Bank, and the order sustaining the attachment in that case was reversed and the attachment dissolved, but the judgment on the merits in favor of the bank was affirmed. See *Skinner v. First Nat. Bank*, 59 Neb. 17. After the levy of the attachment in these three cases certain of the mortgagees brought an action in replevin against the sheriff to recover possession of the mortgaged property. The property was not taken on the writ of replevin, and the case proceeded as one for damages. It is claimed in this action that all the attaching creditors joined in the defense of the replevin suit, although they were not parties to the record, the sheriff alone being made party defendant. The action in replevin resulted in a judgment in favor of the mortgagees and against the sheriff for \$4,089.87,

and costs of the suit. The sheriff prosecuted error to this court, where the judgment was affirmed. See *Sloan v. Thomas Mfg. Co.*, 58 Neb. 713. Each of the creditors had executed an indemnifying bond to the sheriff prior to his levy under the attachments, and the First National Bank paid to him the sum of \$1,872, being the amount of the judgment against him after applying the proceeds of a sale of the mortgaged property, which had been made by the sheriff, who had, pending the determination of the replevin suit, been appointed receiver of such property.

In the meantime the bank had sold the real estate taken on its attachment, and bid in the same for \$505, and applied the amount upon its judgment. After these several suits had been finally determined in this court the Avery Planter Company commenced an action against the First National Bank to recover its judgment against Meek, Skinner & Company out of the proceeds of the sale of the real estate of the said firm, which had been sold under the attachment, in favor of the First National Bank. That suit was brought upon the theory that the attachment in favor of the bank had been dissolved by this court in *Skinner v. First Nat. Bank*, 59 Neb. 17; that, as a consequence of the dissolution of the bank's attachment, the attachment of Maggie Wishard had become a first lien upon said real estate, and the attachment of the Avery Planter Company a second lien. In that suit the bank filed a counterclaim for contribution, which was stricken out on demurrer. On error taken to this court by the bank the syllabus of the opinion filed in that case is in part as follows: "Writs of attachment issued in separate suits of several creditors against a common debtor, were successively levied on the same property. Motions to dissolve these attachments were overruled and afterwards all the actions were prosecuted to final judgment. From the order sustaining the first attachment and a final judgment rendered in the same proceeding, the defendant in attachment prosecuted error to this court where the order was reversed and the final judgment affirmed, but no proceed-

ing in error was prosecuted from the order sustaining the other attachments. Pending a review in this court, the property attached, belonging to the defendant, was sold to the first attaching creditor under an order of sale issued on the judgment of such party, rendered in the attachment suit, and the proceeds applied on that judgment, the other judgments remaining wholly unsatisfied. *Held*: (1) That an action for restitution would not lie against the first in favor of the subsequent attaching creditors, but that an action for money had and received could be maintained to which the defendant might interpose a counterclaim or set-off. * * * (2) The seizure of the goods of a third party by the sheriff under an order of attachment is tortious, and attaching creditors who join with the sheriff in resisting an action brought by such third party to recover the goods become trespassers *ab initio*, and jointly and severally liable for a money judgment rendered therein in favor of such third party. (3) When such judgment is satisfied by one of the parties, contribution will be enforced, where it appears that the parties acted in good faith and without any intention of committing a trespass. (4) The basis of contribution in such cases is the ratio the claims of the several attaching creditors bear to each other." *First Nat. Bank v. Avery Planter Co.*, 69 Neb. 329. On the decision of that case Schappel, administrator of the estate of Maggie Wishard, and the Avery Planter Company commenced separate actions against the bank to recover from it the amount for which the real estate of Meek, Skinner & Company had been sold under the attachment issued in favor of the bank, and which attachment had been dissolved by the judgment of this court. The bank also filed a bill in equity against Schappel, administrator, and the Avery Planter Company, asking for contribution, these three cases were, by order of the court, consolidated and tried together. The court entered a judgment finding that the bank had paid to the sheriff the sum of \$1,872, being the difference between the judgment obtained in the replevin action brought against the sheriff and the

amount received from a sale of the mortgaged goods in controversy in that action. It was further found that, while these consolidated actions were pending, Meek, Skinner & Company, the common debtor of all the parties, paid the First National Bank by way of compromise and settlement the sum of \$1,000, which should be credited on the amount paid by the bank, leaving \$872 toward which contribution should be enforced; further, that the First National Bank received from the sale of the attached real estate the sum of \$505, and that the cost of such sale was \$26.25, which amount would have attended a sale by either of the other attaching creditors, leaving the net proceeds in the hands of the bank, the sum of \$478.75. Following the rule announced in *First Nat. Bank v. Avery Planter Co.*, *supra*, that contribution should be made on the basis of the ratio which the several judgments of the parties bore to each other, the court found that the judgment of the bank was for \$4,850.70, of Wishard, \$187.50, the Avery judgment, \$171.88, and contribution was awarded the bank in the proportion that the judgments bore to each other; and the judgment was entered against the bank in favor of Schappel, administrator, and the Avery Planter Company, for the amount of their several judgments, with interest, after deducting from the amount the sum found due the bank by way of contribution. From this judgment the bank has appealed.

The first contention of the bank is that its attachment has never been dissolved. The theory, as we understand from the brief of counsel, is that while the order of the district court sustaining its attachment was reversed by this court, and a mandate issued directing the district court to carry into effect the judgment of the supreme court, the district court failed to make any order showing upon its records that the attachment had in fact been dissolved. This we regard as a pure technicality. The order of this court was final and determined the rights of the parties. A copy of the mandate is contained in the record, and it is expressly recited therein that "upon a

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trial of which cause in said supreme court during the September term, 1899, it was considered by said court that the judgment rendered by you in said cause on the pleadings be affirmed, and that the order overruling the motion to dissolve the attachment and order directing the sale of the attached property be reversed." This mandate is a part of the records of the district court for Pawnee county, and the parties affected by that decision have, ever since it was filed, proceeded upon the theory that the bank's attachment had been dissolved.

We have examined the records with some care, and think the bank has no cause to complain of the judgment appealed from. The only ground on which contribution could be enforced in favor of the bank against the other parties is that they joined the bank in resisting the action brought against the sheriff to recover the mortgaged goods. There is no direct evidence in the record which in our judgment establishes the fact that they did join with the bank in resisting the replevin action. It is true that the attorneys for the bank, and who conducted the defense for the sheriff in the replevin action, were attorneys for Maggie Wishard and the Avery Planter Company in suing out their attachments, and the writs of attachment in these two cases were introduced on the trial; but there is no direct evidence that either of these parties authorized an appearance for them in that case, or directed that any action should be taken in their behalf. Our conclusion is that the bank has all, if not more than all, that it was entitled to, and that the judgment should be affirmed.

· EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GEORGE MCCARTER, APPELLEE, V. CITY OF LEXINGTON,
APPELLANT.

FILED FEBRUARY 20, 1908. No. 15,076.

1. **Licenses: INJUNCTION.** In 1904 the city of Lexington passed an ordinance imposing an occupation tax on the business of keeping billiard and pool halls. On May 26, 1906, a second ordinance went into effect requiring the keeper of billiard and pool halls and bowling alleys to apply to the mayor and city council for a license to conduct the business. *Held*, That a party who had paid the occupation tax required by the ordinance of 1904, prior to the ordinance of 1906 going into effect, was not entitled to an injunction to restrain the officers of the city from prosecuting him for conducting his business without a license.
2. **Cities: ORDINANCES: VALIDITY.** The motive governing a legislative body in passing a statute or ordinance is not a proper subject for investigation by the courts.

APPEAL from the district court for Dawson county:
BRUNO O. HOSTETLER, JUDGE. *Reversed*.

H. D. Rhea and D. H. Moulds, for appellant.

J. A. Shecan, H. M. Sinclair and George C. Gillan,
contra.

DUFFIE, C.

In April, 1904, the city of Lexington passed an ordinance levying an occupation tax of \$150 upon the business of conducting a billiard hall and pool room within the corporate limits of the city. The tax was made payable to the city treasurer for the purpose of municipal revenue on the 1st day of May of each year. On May 26, 1906, another ordinance was passed providing for the licensing and regulation of billiard and pool rooms and bowling alleys in the city of Lexington, which made it unlawful for any person or corporation to keep within said city any pool or billiard room or bowling alley with a view of gain, or where money was charged for playing or bowling

therein, unless a license to conduct said business was first obtained. The person desiring to engage in the business was required to make application in writing to the mayor or council of the city, asking for such license and describing the premises on or in which it was proposed to conduct the business, and thereupon the mayor and council might grant or reject said application, and, in case the application was granted, the clerk instructed to issue a license to the applicant upon his depositing with the clerk a receipt showing payment to the treasurer of the amount of the occupation tax required by the ordinance of the city. Section 3 of this act imposes a fine of not less than \$5 nor more than \$50 for the violation thereof, and authorizes the commitment of any party convicted of violating the ordinance until the fine and costs are paid. Each day that a billiard or pool room or bowling alley is kept open in violation of the provisions of the ordinance is made a distinct offense.

George McCarter, the plaintiff, filed his petition in the district court for Dawson county July 2, 1906, in which he alleges that on the 21st day of May, 1906, he paid to the treasurer of defendant city the sum of \$150 as an occupation tax for the privilege of conducting a billiard and pool hall for the municipal year of 1906; that this sum was duly accepted by the treasurer as contemplated by the ordinance then in force. The petition further alleges the passage of the second ordinance above referred to, and alleges that said ordinance was passed for the express purpose of depriving the plaintiff of his constitutional rights under the ordinance in existence when he paid his occupation tax, and for the purpose of driving him out of business, and for the purpose of affording a rival in the same business protection against competition. He further alleges that on the 12th of June, 1906, the city, through its duly elected officers, filed a complaint against him charging him with eight violations of the ordinance last referred to; that he was prosecuted, fined and imprisoned, and again on the 21st of June, 1906, he

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was arrested, charged with eight further violations, and upon trial was fined and imprisoned the second time; that he was compelled to furnish bond and appeal to the district court; and that he has perfected such appeals, and requested the city officers to refrain from filing further complaint against him until the question at issue can be determined by the district court. But the city through its mayor refuses to desist from prosecuting him, and threatens to keep on bringing new actions under said license ordinance until he shall close his business. The prayer was for an injunction against the city and its officers, restraining them from arresting, prosecuting or molesting the plaintiff in connection with the license ordinance above mentioned, and especially from bringing any further prosecution against him for a violation thereof until the further order of the court. A temporary injunction was issued upon filing this petition, which upon the final hearing was made perpetual, and from this judgment the defendant has appealed.

Section 8719, Ann. St. 1903, authorizes cities and villages to raise revenue by levying and collecting a license tax on any occupation or business within the limits of the city or village, and to regulate the same by ordinance. Section 8723, authorizes cities and villages to make all such ordinances, by-laws, rules, regulations, and resolutions, not inconsistent with the laws of the state as may be expedient, in addition to the special powers in this chapter granted, maintaining the peace, good government and welfare of the corporation, and its trade, commerce and manufactories, and to enforce all ordinances by inflicting fines or penalties for the breach thereof, not exceeding \$100, for any offense recoverable with costs, and, in default of payment, to provide for confinement in prison, or jail, or by hard labor upon the streets, or elsewhere, for the benefit of the city or village. In *Morgan v. State*, 64 Neb. 369, it was held that the section last quoted gives village authorities ample power by ordinance to license and regulate billiard and pool rooms. The ordinance to license

billiard and pool halls now under consideration did not attempt to impose upon the plaintiff or upon any one engaged in the business any tax in addition to the occupation tax provided by the ordinance of 1904. The payment by the defendant of the occupation tax required by the ordinance of 1904 did not insure him against such rules and regulations for the conduct of his business as the city might thereafter think it expedient to impose. The right to enjoy a privilege under a municipal license is not property of such a character that a court of equity will protect it, after the implied revocation of the license, against the result of a criminal or other prosecution. *Littleton v. Burgess*, 14 Wyo. 173, 2 L. R. A. (n. s.) 631, and cases cited. The fact, if such be the case, as alleged by the plaintiff in his petition, that the city council was induced to pass the ordinance of May 26, 1906, to injure the plaintiff in his business, and to aid a rival in such business, is a matter with which we have no concern, and which we cannot investigate. The motives inducing action by a legislative body is not a proper subject of inquiry by the courts. Cooley, Constitutional Limitations (5th ed.), *186. The city had ample authority to pass the ordinance in question, and a court of equity will not enjoin prosecutions brought to enforce it.

We recommend the reversal of the judgment appealed from.

EPPELSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

REVERSED.

JOHN O. YEISER, APPELLANT, v. FRANK A. BROADWELL ET AL., APPELLEES.

FILED FEBRUARY 20, 1908. No. 15,300.

Jury, Trial by. In a law action a party is entitled to a jury trial as a matter of right.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed with directions.*

John O. Yeiser, pro se.

Byron G. Burbank, S. R. Rush and E. H. Scott, contra.

DUFFIE, C.

Broadwell, one of the defendants, is clerk of the district court for Douglas county, and came into possession of the fund in controversy in this action through a garnishment proceeding instituted by the intervener, Cathers. Cathers had issued an execution upon a judgment which he claimed to hold against Phoebe Linton, and which he alleged was unsatisfied. He caused W. K. Potter, as receiver of the Omaha Loan and Trust Company, to be garnished, and Potter paid into court a sum in excess of \$1,800, which he held as the property of Mrs. Linton, and which it is conceded was derived from the rents of real property which had once stood in the name of Mrs. Linton. Upon the final hearing of the garnishment proceeding, the court found that the judgment upon which such proceeding was based had been satisfied, and an order was entered directing the discharge of the garnishee, and that such judgment be canceled of record. No order was made disposing of the money paid into the court by Potter, and Broadwell continued in possession of the fund. Afterwards Cathers filed a motion requesting the court to direct the application of that money toward the satisfaction of a later judgment that he had obtained against Mrs. Linton.

Yeiser asserted a claim to the money under an assignment of the fund from Mrs. Linton and her husband, and moved the court for an order directing its payment to him. The court heard the parties and ordered the fund applied toward the satisfaction of Cathers' judgment against Mrs. Linton, from which order Yeiser appealed to this court, where the same was reversed, the opinion stating that the court should order the money repaid to Potter, the garnishee, unless in a proper proceeding to which all parties in interest should be made parties it was made to appear that one of the present claimants was entitled to the fund. See *Yeiser v. Cathers*, 73 Neb. 317. After this opinion was handed down Yeiser commenced the present action, making Potter, receiver, and Broadwell, both in his individual capacity and as clerk of the district court, parties defendant. In his petition it is alleged that Mrs. Linton was the owner of certain real estate in Douglas county, for which the Omaha Loan and Trust Company was agent in the collection of rents; that in March, 1897, she conveyed the same to Kate Remnant, and Kate Remnant immediately conveyed the same to Adolphus F. Linton; that at the same time Adolphus F. Linton executed and delivered an instrument declaring that he held said property in trust under an antenuptial agreement for his wife, Mrs. Phoebe Linton, and her children; that afterwards the court appointed W. K. Potter receiver of the Omaha Loan and Trust Company, and that the receiver thereafter collected the \$1,860 as rents from the said real estate after the same was conveyed as above stated; that in May, 1902, he was employed as attorney to attend to numerous cases pending against the Lintons and their real estate in Nebraska under an agreement that the rents derived from their real estate should be devoted to the payment of his fee, and giving him authority to collect and apply said rents. The petition further set up certain writings and orders by way of assignment of the fund here in controversy from the Lintons to Yeiser, and alleges that the defendants refuse to recognize his right to the fund and refuse pay-

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ment to him. Judgment is asked against the defendants for the amount of the fund, with interest.

By leave of court Cathers, who had on the 23d of March, 1905, garnished Broadwell and Potter on the later judgment against Mrs. Linton, intervened in this action and filed an answer to the plaintiff's petition. His answer admits the conveyance of certain real estate from Mrs. Linton to Kate Remnant, and from Kate Remnant to Adolphus F. Linton, and alleges that said conveyance was made with the purpose and intent of defrauding Cathers, who was then a creditor of Mrs. Linton, as well as other of her creditors. It is further alleged that the purported assignment of the fund in controversy and of other rents arising from the real estate of the Lintons was made for the purpose of defrauding Mrs. Linton's creditors, and that the same is fraudulent and void as against the intervenor's claim. Other matters alleged in the answer it will be unnecessary to notice further than to state that it does not present or raise any equitable issue relating to this fund. Broadwell and Potter both answered, disclaiming any right to the fund, and Mr. and Mrs. Linton answered, affirming their purported assignment of the fund to the plaintiff, Yeiser. The trial resulted in a judgment for the intervenor, Cathers, and an order was issued directing the clerk to pay the fund to him to be applied upon his judgment against Mrs. Linton. Prior to entering upon the trial Yeiser demanded a jury, which the court refused, and proceeded to try the case without a jury. One of the errors relied on for a reversal is the refusal of the court to submit the issues to a jury, and this assignment of error must, we think, be sustained. In a law action a party is entitled to a jury trial as a matter of right. Const., art. I, sec. 6. *Lett v. Hammond*, 59 Neb. 339, and cases cited. Upon what theory the court refused a jury trial is not disclosed by the record or made plain in briefs of counsel. Each of the parties were seeking to reach this fund, one claiming by a written assignment made prior to the garnishment of the intervenor, the other by legal pro-

ceedings which entitled him to the money, if in fact it was the money of Mrs. Linton and had not previously been assigned to the plaintiff. Neither of the parties claimed the fund by reason of any fact which could not be asserted and protected in a court of law, and no circumstance is disclosed which required the equitable interposition of the court. It is true that this fund was derived from rents arising from land after Mrs. Linton had parted with her paper title, and that Cathers was burdened with the necessity of showing that her conveyance was fraudulent as to him, but this might be shown in an action at law, as well as in an equitable proceeding. He was not asking to reach the land itself and to set aside the conveyance made by Mrs. Linton, which a court of equity alone could do. He was only required to show the fraudulent nature of the conveyances, if it was fraudulent, in order to enable the court to say that, while the title rested in her husband, the rents and profits derived from the land were her property and subject to the payment of her debts. The alleged fraudulent character of the assignment of the fund to Yeiser might be established in a court of law, as well as in an equity proceeding, and these were all facts upon which the plaintiff was entitled to the opinion of a jury.

As the case will have to be remanded for another trial, it would be improper for us to examine or express any opinion on the evidence contained in the record. For the error of the court in denying a jury trial, we recommend a reversal of the judgment, and that the cause be remanded to the district court, with directions to proceed in accordance with this opinion.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded to the district court, with directions to proceed in accordance with this opinion.

REVERSED.

GEORGE WOOD, ADMINISTRATOR, APPELLANT, v. SCHOOL
DISTRICT, APPELLEE.

FILED FEBRUARY 20, 1908. No. 15,067.

Intoxicating Liquors: DEATH OF LICENSEE: RECOVERY OF LICENSE MONEY. In the absence of a statute permitting it, the legal representatives of a deceased licensee cannot recover any part of the amount paid for the liquor license because of the latter's death before the expiration of the term of the license.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

C. A. Rawls, for appellant.

D. O. Dwyer, contra.

EPPELSON, C.

The petition filed in the district court alleged in substance that on the 1st day of May, 1905, one Simon Metz was duly licensed by the board of trustees of the village of Louisville in Cass county, Nebraska, to vend malt, spirituous, vinous and intoxicating liquors in said village, for which he paid \$500 license money, which was turned over to the defendant school district. That on June 20, 1905, the said Metz died, and later the plaintiff was appointed as administrator. Plaintiff prayed for judgment against the defendant for the unearned portion of the license money, to wit, \$130.56. To this petition the defendant filed a general demurrer, which was by the court sustained. The plaintiff elected to stand on his petition, whereupon judgment of dismissal was entered, and plaintiff appeals.

Plaintiff contends that upon the death of the licensee the license was canceled by operation of law, and the administrator is entitled to recover *pro tanto* of the sum paid for the unexpired term of the license. Where a liquor license has been issued by a licensing board, and on appeal

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canceled by the court, the law will permit a recovery *pro tanto* of the sum paid. *State v. Cornwell*, 12 Neb. 470; *Lydick v. Korner*, 15 Neb. 500; *State v. Weber*, 20 Neb. 167; *Chamberlain v. City of Tecumseh*, 43 Neb. 221; *School District v. Thompson*, 51 Neb. 857. The reason for the above rule seems to be that the licensing board either had no authority to grant the license or erroneously granted the same, on account of which the license was revoked. In the case at bar the license was rightfully issued. It was not terminated by any act of the licensing board, and the rule of the cases cited is not applicable. Neither the legal representatives of a deceased licensee nor any other person, can receive the benefits of a license. It is a personal privilege granted to the licensee. It cannot be assigned, devised, or transmitted to heirs. Plaintiff argues that these are reasons for permitting a recovery herein. Upon the oral argument I was favorably impressed with this proposition, for the reason that it seemed fair and just that the estate of a deceased person should recover unearned license money so long as it was impossible to continue the business under the license. But upon further consideration I am convinced that the law will not permit a recovery. The deceased paid the license fee voluntarily, and received all that the licensing board could give to him. The license was not rendered inoperative through any fault of the authorities. In the absence of a statute permitting it, the legal representatives of a deceased licensee cannot recover any part of the amount paid for the liquor license because of the latter's death before the expiration of the term of the license.

We recommend that the judgment be affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

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STATE, EX REL. JOHN W. HARRIS ET AL., APPELLANTS, V.
JAMES F. HANSON ET AL., APPELLEES.*

FILED FEBRUARY 20, 1908. No. 15,511.

1. **Eminent Domain: DRAINAGE.** An act of the legislature, appearing as chapter 153, laws 1907, provides that, "whenever it will be conducive to the public health, convenience or welfare either to drain any wet land, or to drain any land subject to overflow by water, or any land which will be improved by drainage, or to build or construct any dyke or levee to prevent overflow by water, * * * a drainage district may be formed * * * for the purpose of inaugurating, constructing, controlling and maintaining said work or works of public improvement," and providing that such drainage district may be formed by a majority vote of the property owners interested, the boundaries of the district being determined by the county commissioners, who are required to fix the same "with a view to promoting the interest of said drainage district, if formed, and with a view to doing justice and equity to all persons," and further providing for the taxation of property benefited for the purpose of raising revenue to pay for such improvements, and that the district, when formed, may condemn private property for its use in constructing drains, dykes, or levees. Said act will not permit the organization of a corporation in furtherance of private interests, and will not permit the taking of property for private purposes.
2. ———: ———. The phrase, "with a view to promoting the interest of said drainage district," used in said act relative to the duties of the county commissioners in establishing the said district, means the public interest, and not the private advantage to be gained by any property owner.
3. **Elections: DRAINAGE DISTRICTS.** Section 22 of the bill of rights (Const., art. I), providing that "all elections shall be free, and there shall be no hindrance or impediment of the right of a qualified voter to exercise the elective franchise," does not apply to an election upon the formation of a drainage district, nor one for the election of officers therefor.
4. **Drains: LEGISLATIVE ACTS.** The constitution does not prohibit contemporary legislative acts providing different modes for the formation of drainage districts.
5. ———: **ESTABLISHMENT.** The establishment of the boundaries of a proposed drainage district is *prima facie* evidence that the county commissioners proceeded regularly in the establishment thereof and that all conditions precedent have been complied with.

* Rehearing allowed. See opinion, p. 738, *post*.

APPEAL from the district court for Dodge county: JAMES G. REEDER, JUDGE. *Affirmed.*

F. W. Button and I. L. Albert, for appellants.

Courtright & Sidner, contra.

T. F. A. Williams, amicus curiæ.

EPPERSON, C.

This action is one in the nature of *quo warranto* to determine whether or not the Farmland, Fremont & Railway Drainage District, of which the defendants are, or purport to be, the officers, is a legally existing corporation. The district was organized under the provisions of an act of our last legislature, published as chapter 153, laws 1907. The constitutionality of this act is questioned. It is in part as follows:

"Section 1. Whenever it will be conducive to the public health, convenience or welfare either to drain any wet land, or to drain any land subject to overflow by water, or any land which will be improved by drainage, or to build or construct any dike or levee to prevent overflow by water, or to construct, straighten, widen, deepen or alter any ditch, drain, stream, or watercourse, or to riprap or otherwise protect the bank of any stream or ditch, or to construct, enlarge, extend, improve or maintain any system of drainage, or to construct, enlarge, extend, improve or maintain any system of control of surface-water or running water, or to do any two or more of said things jointly, then a drainage district may be formed and may proceed as hereinafter provided, for the purpose of inaugurating, constructing, controlling and maintaining said work or works of public improvement.

"Section 2. When the district proposed contains real estate owned by less than twenty persons or corporations, one-fourth of said number shall be sufficient to petition for the formation of such district. When there are more

than twenty such owners, ten or more owners of real estate therein may sign a petition for the formation of such district, and file said petition with the county clerk of the county having the largest body of land within said proposed district. Said petition shall suggest the boundaries of said district, the number of directors that said district shall have, if formed, and the amount of bond each shall give."

"Section 4. Thereupon the board of supervisors or commissioners of such county shall take to their assistance the county surveyor of said county and shall determine whether or not the boundaries of said proposed district are reasonable and proper, and if said board find that the boundary line of said district should be changed, they shall change the same and fix the boundary line where the same, in the judgment of said board, should be fixed with a view to promoting the interest of said drainage district, if formed, and with a view to doing justice and equity to all persons. Any one asking shall be given a hearing as to the boundary. Said board shall also determine the number of directors that said district shall have, if formed, and the amount of the bond to be given by each, and shall make a record of their action.

"Section 5. Thereupon the county clerk of said county shall publish a notice once each week for three weeks in a newspaper published at the county seat of each of the counties having land within the proposed district, which notice shall state the filing of said petition; that it is filed under the provisions of this law, giving the title hereof in full; the boundaries of said proposed district as fixed by said county board; that an election will be held at the office of the county clerk between the hours of 8 o'clock A. M. and 6 o'clock P. M. on a day named therein; that at said election the question of the formation of said district shall be determined, and a board of directors elected, giving the number of such board, said board to take office contingently on the formation of said district."

Section 7 is in part as follows: "At all elections the

county clerk and such assistants as he shall choose shall constitute the election board and the canvassing board. Any person may cast one vote on each proposition to be voted on for each acre of land or fraction thereof and for each platted lot which he may own or have an easement in, as shown by the official records of the county where said land or lots may be. Any corporation, public, private or municipal, owning or having an easement in any land or lot may vote at said election, the same as an individual may. The executor, administrator, guardian or trustee of any person or estate interested shall have the same right to vote." It is unnecessary to further quote from the act at this time. Other provisions will hereafter be set forth as necessity requires.

It is contended by plaintiffs that by this act the legislature delegated to private individuals the power to determine the necessity of the improvement, and therefore it is special legislation prohibited by the constitution. And, again, it is argued that, inasmuch as a few individuals owning the greater acreage of a district could control the same against the wishes of the majority, the enforcement of the act would operate in the taking of property without due process of law, and would amount to taxation without representation, and is against public policy. It is argued that the act must fail because the right to vote for the establishment of the district and for officers is limited to property owners. Complaint is made that it provides for or permits the taking of property for private purposes; in other words, that there is no legal provision made for determining whether or not a proposed district would be conducive to the public health, convenience or welfare.

The most important question for determination is whether the act standing alone would permit the formation of districts solely for the advancement of private interests, or is it operative only in districts, the formation of which are by some legal means ascertained to be conducive to the public health, convenience or welfare. If

the former, then without doubt the law is defective; if the latter, it is not subject to this objection. The act in controversy provides for the reclamation and protection of lands by the organization of districts upon which corporate functions are imposed, and, if the act is valid, such districts become corporations. To meet the expenses of such improvements, funds are raised by the levy of taxes upon property benefited, and, moreover, the district may condemn private property for its use in constructing drains, dykes or levees. That an individual may become the beneficiary of the proposed improvement does not alone make the establishment of a drainage district a private instead of a public enterprise. And the fact that many individuals are interested from a pecuniary standpoint, that their property is increased in value, thereby adding to the wealth of the state and correspondingly contributing to the general revenues, go to establish such an enterprise as one of public welfare. That the power of the state exists to promote the public health, benefit and welfare by the construction of drains, dykes, levees and the making of other similar improvements can no longer be questioned. Public health, convenience and welfare, the promotion of which is ever essential, mean the effect upon the people of the particular vicinity concerned. In contrast to the benefits of the few, it means those things which benefit the many. It is within the power of the legislature to further the public health, convenience or welfare by the enactment of drainage laws or providing for the protection of property by dykes and levees. In *Neal v. Vansickle*, 72 Neb. 105, this court had before it for judgment chapter 116, laws 1903, which provided for the formation of drainage districts for the reclamation and protection of swamp, overflowed or submerged lands, etc. The body of the act provided that the district must contain at least 640 acres. The constitutionality of the act was questioned. So far as the question relating to the right of public corporations organized for the reclamation of lands by taxation for improvements and the exercise of eminent domain, that

case is similar to this, and reference is made to the opinion, which we need not quote. It was there held: "The drainage and reclamation of large tracts of swamp and overflowed or submerged lands is a matter of general public utility and concern, for which the legislature may provide by the creation of local administrative organizations or political corporations." It will be observed that in the act of 1903 no provision was expressed that it should apply only to districts wherein the public health, convenience or welfare would require it. Yet it was self-evident that the reclamation of large tracts of land would subserve the public welfare. That such is true has become a maxim—a public policy, which is recognized by all the courts. It would seem, therefore, that any act of the legislature which provides for the reclamation or protection of large tracts of swamp, overflowed or submerged lands could not be open to the objection that its enforcement would result in the taking of property for private purposes. The act of 1907 applies to any land, whether it be a large tract or small, the protection of which would be a public utility. But the fact that the tract is of small area does not necessarily make its reclamation any the less a public benefit. The act contains sufficient safeguards to prevent its being subservient to private interests. We cannot see the dangers which plaintiffs contend are liable to result from its enforcement. A few individuals cannot for their private purposes create a drainage district and impose the burdens thereof upon their neighbors. Neither can a few or many acting in their individual interests prescribe the boundaries of the proposed district. By their petition they only suggest the boundaries; whereupon the county commissioners, with the assistance of the county surveyor, shall determine the same. When we consider that the act expressly provides that such drainage district can be created only "whenever it will be conducive to the public health, convenience or welfare (sec. 1)," and, further, as provided in section 4 of the act, that in fixing the boundaries the board shall determine the same "with a view to

promoting the interest of said drainage district, if formed, and with a view to doing justice and equity to all persons," we can reasonably conclude that the formation of the district will in the opinion of the county commissioners be conducive to the public health, convenience or welfare. If the boundaries suggested in the petition of the promoters are not such as the law contemplates, the county board should change the same to include such additional or different territory, the protection of which would in their opinion serve public interest in contradistinction to private gain. And, if the county board find it impossible to establish the boundaries of a district, the interest of which would be promoted, it need proceed no further, and all proceedings would terminate. The phrase "the interest of said drainage district," used in section 4 of the act, means the public interest of the district, and not the private advantage to be gained by any property owner. As an additional safeguard the property owners are given a voice in the incorporation and establishment of the district. After the county board has fixed the boundaries an election is called in which the property owners vote for or against the incorporation thereof. Section 8 of the act provides: "If a majority of the votes cast at said election shall be in favor of the formation of said district it shall be conclusive that the formation of said district, and the work that may be done under the supervision of the board of directors, will be for the public health, convenience and welfare." The submission of the question to the property owners of a district established by a duly authorized tribunal is not a violation of any constitutional provision. That the legislature may delegate to administrative officers the power to determine whether a particular proposed improvement will be conducive to the public health, convenience or welfare is an established rule. The same function may be delegated to the electors of a municipality. We know of no reason why the property owners of a district established by the county board should not be competent to determine for themselves whether or

not they shall incorporate, and thereby at their own expense establish a system of drainage and dyking for the reclamation of land, the doing of which will be conducive to the public welfare.

It is argued under the provisions of the act that the vote provided for therein must be taken as conclusive of the question of public utility, when in fact the voters are not required to express themselves upon that question, but instead may vote as their individual interests dictate. If we were to consider the election alone decisive of the question of public utility, we could not say that the act was for this reason invalid. In *Board of Directors v. Collins*, 46 Neb. 411, this court, quoting from the opinion in *In re Bonds of Madera Irrigation District*, 92 Cal. 296, say in reference to the organization of an irrigation district: "We know of no more appropriate mode of such indication than the affirmative vote of those who are to be affected by the acceptance of the terms of the act. * * * Inasmuch as there is no restriction upon the power of the legislature to authorize the formation of such corporations for any public purpose whatever, and as when organized they are but mere agencies of the state in local government, without any powers except such as the legislature may confer upon them, and are at all times subject to a revocation of such power, it was evidently the purpose of the framers of the constitution to leave in the hands of the legislature full discretion in reference to their organization. * * * In determining whether any particular measure is for the public advantage it is not necessary to show that the entire body of the state is directly affected thereby, but it is sufficient that that portion of the state within the district provided for by the act shall be benefited thereby. The state is made up of its parts, and those parts have such a reciprocal influence upon each other that any advantage which accrues to one of them is felt more or less by all of the others." Granting that each person entitled to a vote would express himself as his private interests dictate, and the result of the election shows a

majority of the votes cast favorable to the formation of the district, we then have the established fact that the owners of the greater number of tracts or acres of land involved are each of the opinion that his own private interests will be best subserved by the formation of the district. This, in our opinion, establishes the fact that the organization thereof will be conducive to the public welfare. The public is but an aggregation of individuals, and it is unnecessary that the aggregation be composed of the people of an entire state, county, township or city. The common weal of a particular vicinity is a matter of public concern. The protection of land against floods and overflow and its reclamation from inundations, where an entire vicinity is benefited, is conducive to the public interests. In such cases the interests of many individuals amalgamates into and becomes a matter of general welfare, the promotion of which forms one of the purposes for which the government exists. The reciprocal influence which the improvement of each tract of land has upon the other is combined for the advantage which accrues to all; their being united is a matter of public utility when, were an individual alone affected, it would be considered but a mere private advantage. We are convinced that the formation of a reclamation district, the boundaries of which are fixed by county commissioners, upon the majority vote of the property owners of the district, is not in contravention of any constitutional provision, and does not contemplate or permit the furtherance of private interests. That part of section 8 quoted which declares that the formation of the district shall be conclusive that all the work that may be done under the supervision of the board of directors will be for the public health, convenience or welfare is not before us for consideration. Undoubtedly, were the board to undertake some work which in fact would not further the interests of the district, the provisions of the act would not prevent the granting of proper relief. But the possibility of such conduct on the part of the board does not require the annulment of the act.

Relative to this election, a further objection above referred to must be considered. The act in question provides that any person may cast one vote for each acre of land or fraction thereof, and for each platted lot which he may own or have an easement in. This it is argued is a violation of section 22 of the bill of rights, which reads: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Section 1, art. VII of the constitution provides: "Every male person of the age of twenty-one years or upwards belonging to either of the following classes, who shall have resided in the state six months, and in the county, precinct, or ward for the term provided by law, shall be an elector: First. Citizens of the United States. Second. Persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States, on the subject of naturalization, at least thirty days prior to an election." It is argued that the officers of the drainage district are public officers, and that the act is contrary to the sections of the constitution last above cited, in that the electors under section 1, art. VII, are barred from participating in the election for the establishment of the district, and for the officers thereof. In *State v. Cones*, 15 Neb. 444, it is held that the act allowing women possessing the qualifications therein prescribed to vote at school meetings is not in conflict with the constitution, and is valid. It is said in the opinion that an examination of the constitution will convince any one that the provisions in regard to elections were not intended to apply to school districts. In *Board of Directors v. Collins*, 46 Neb. 411, our Nebraska irrigation law was held to be constitutional. That law provides for the formation of irrigation districts by a vote of the people, and expressly limits the right to vote to those who own not less than ten acres of land within the proposed district. It is apparent that the constitutional qualification of electors was prescribed in that instrument for the purpose of determining who is entitled to vote for the

officers prescribed by the constitution itself. And, again, a reclamation district could be established and put into operation without the calling of an election. The legislature might have chosen some other mode for the formation of the district, which, if reasonable in its terms, would be effective without the calling of an election of property owners. It might have been left to an administrative body such as the county board. Because the legislature chose this particular mode, it cannot be said that the formation of the district was illegal because electors of the district owning no real estate were barred from participating therein, or because each property owner was given a vote for each acre or lot of land he owned. The legislature may provide for the election of officers not named in the constitution by means other than the popular vote of electors. The act seems to be somewhat deficient, in that it provides in section 4, with reference to the establishment of the boundaries of the district by the county commissioners, that "anyone asking shall be given a hearing as to the boundary." But it does not require a notice to be given to the property owners of the time when they may be heard. It would seem that the legislature intended that each property owner should be given a hearing, but neglected to provide an opportunity. This is not a defect which would permit us to declare the act unconstitutional. We cannot see wherein it affects one's property interests. The establishment of the district is not the taking of property. No rights are invaded by the failure of the act in this regard. Notice is given to the interested parties after the county board has established boundaries of the district, and an opportunity is given to all at that time to vote for or against the incorporation of the district.

It is suggested that the act is an attempt to amend existing law without repealing the same. By section 31 it is expressly stated: "None of the provisions of this act shall be construed as repealing or in anywise modifying the provisions of any other act relating to the subject of drainage." Thus we see that it expressly avoided an attempt

to amend or to repeal any part of any existing law pertaining to the question of drainage. We fail to see wherein this act contravenes section 11, art. III of the constitution, which forbids that any law shall be amended unless the law sought to be amended be repealed, as contended for by the plaintiffs herein. On the contrary, it seems that the legislature by this act and the act of 1905, ch. 161, have provided different modes for the organization of reclamation districts, but this is not prohibited by the constitution. The interested parties may in localities wherein either law is applicable choose whichever mode they desire for the organization of their district. Neither does the act by implication or otherwise repeal any of the provisions of the general corporation law. Indeed, it seems that the general provisions are inadequate to meet the needs of drainage districts, and the act of 1907 must be taken as supplemental and complementary to all other laws pertaining to the formation of corporations.

Plaintiffs' contention that the act authorizes the taking of private property for private use is incident to and based upon his other contention that the act permits the organization of a district for the furtherance of private interest. But, as shown above, the operation of the law will be consistent with the expressed intention of the legislature, and will not permit of the taking of property by private individuals or corporations for their own personal benefit. The organization under the act and the operation of the district once established will, as we have attempted to show, subserve public interests, and the property taken and taxes imposed by reason thereof will not be a violation of the constitution.

But it is contended that, if the act is constitutional, plaintiffs should prevail because of certain irregularities in the formation of this particular district. It is alleged in the petition "that the county commissioners made no finding that said district, if formed, would be conducive to the public health, convenience or welfare as required by law," and in the answer a conclusion of the pleader is

stated in effect that the county commissioners had no power to consider the matter; defendants' contention being that the law leaves to the voters the power to determine this jurisdictional question. The court is not bound by the conclusions of law pleaded by the defendants. Plaintiffs' allegation above quoted is not supported by the admission of defendants. If it was the purpose of the petition to allege that the county commissioners made no record of their findings, the plaintiffs' contention is subject to the further objection that none was required. The fixing of the boundaries of the proposed district is *prima facie* evidence that the same were regularly established.

By section 5 of the act, it will be observed that the notice of election is given by the county clerk, who "shall publish a notice once each week for three weeks." The notice here involved was published by the county clerk in a paper published in Dodge county, the first publication thereof being on May 23, 1907, and the last on June 5, 1907; and in Douglas county, the first on May 24, and the last on June 7. The election was held June 8, 1907. Plaintiffs contend that the notice of the election is defective, in that the first publication was not at least three weeks prior to the election. At first glance, there seems to be some confusion among the decisions of this court as to the notice necessary to be given under statutory provisions similar to that here considered. There are statutory provisions requiring notice of various proceedings to be made by publication for different periods of time, some of which have been considered by this court. In *Davis v. Huston*, 15 Neb. 28, it was held that the statutory provision, "the publication must be made four consecutive weeks," meant that the notice "should be printed or inserted in a weekly newspaper once each week for four weeks successively, and that the publication is deemed complete upon the distribution of the newspaper containing its fourth successive weekly insertion." In *Alexander v. Alexander*, 26 Neb. 68, an act providing for the publication of a notice three weeks successively previous to the time appointed is complied

with by a publication once each week for three successive weeks; in other words, three weekly publications, and the last publication need not necessarily be 21 days from the date of the first. In that case the hearing of which the publication in controversy gave notice was only 16 days later than the date of the first publication. In *State v. Cherry County*, 58 Neb. 734, this court had before it for consideration section 27, art. I, ch. 18, Comp. St. 1897, which provided that the mode of submitting certain questions to the people prior to an election "is to be published for four weeks in some newspaper published in the county." It was held that the word "for" means during and that the notice must be published for, or during, four weeks before the election. Section 497 of the code provides that notice of sales of land upon execution shall be given "for at least 30 days before the day of the sale by advertisement in some newspaper printed in the county." It was held in *Lawson v. Gibson*, 18 Neb. 137, that the notice is required to be published during the 30 days. It is required by statute that an application for license to sell intoxicating liquors shall not be considered until at least two weeks' notice thereof has been given by publication. This has been held to require the publication of the notice for two successive weeks, two weeks intervening between the first publication and the hearing of the application.

There is no conflict in the authorities cited. Where the time mentioned by the statute expresses the duration of the notice, the same must be published for and during the time mentioned. Where, however, the time mentioned indicates only the number of times the notice is required to be published, it is satisfied if the notice is published the number of times mentioned. It is apparent that the phrases, "shall publish a notice once each week for three weeks," and "a notice shall be given for three weeks by publication," have different meanings. In the first "for three weeks" limits the number of publications, and in the

other phrase "for three weeks" fixes the period of time during which the publication must be made. *Alexander v. Alexander, supra*, is in point, and should be followed. No valid objection to the constitutionality of the act has been presented.

The lower court found for the defendant, dismissing the plaintiffs' action, and we recommend that its judgment be affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed July 17, 1908. *Former judgment of affirmance adhered to:*

1. **Statutes: CONSTRUCTION.** In construing an act of the legislature, the court will give to it the meaning which it is apparent from the language used that the legislature had in mind when the act was passed.
2. **Drainage Districts: DUTIES OF COUNTY BOARDS.** Chapter 153, laws 1907, provides that, "whenever it will be conducive to the public health, convenience or welfare either to drain * * * any land which will be improved by drainage, or to build or construct any dyke or levee to prevent overflow by water, * * * a drainage district may be formed," the boundaries of which are to be fixed by the county board upon the filing of a petition by interested property owners, and providing that the county board shall fix the boundaries "with a view to promoting the interest of said drainage district, if formed, and with a view to doing justice and equity to all persons." *Held*, That it is a necessary inference from the language used that the board shall determine the public utility of the proposed district, and that it is not the imperative duty of the board to fix the boundaries if the reclamation and improvement of the district would not promote the public health, convenience or welfare.
3. ———: ———. From the language used it is apparent that the legislature intended that the provisions of the act should not be applied except that the county board should prescribe a district, which, if organized and improved, would in fact promote the public health, convenience or welfare.

4. **Elections: DRAINAGE DISTRICTS.** After the county board has fixed the boundaries of a district the reclamation or protection of which would be of public utility, it is competent for the legislature to permit the property owners within the proposed district to determine by vote whether or not they will avail themselves of the benefits of the act, and the provisions permitting none but property owners to vote, and authorizing each owner of real estate to cast a vote for every acre of land or town lot which he owns within the proposed district, and permitting nonresident owners and foreign corporations owning real estate therein to vote upon the question of organization and for the officers of the district are not unlawful, nor does such election call for the exercise of the elective franchise secured to all electors by section 22 of the bill of rights. Const., art. I.
5. **Eminent Domain: DRAINAGE DISTRICTS.** An act of the legislature providing for the organization of a drainage district whenever the same will promote the public health, convenience or welfare, funds for the improvement to be raised by special assessment of the property in proportion to the benefits received, and which provides that notice of assessment shall be served on the property owner giving him the right to appear and be heard and to appeal from the order of the assessing officers, does not amount to the taking of private property for private use, nor for public use without just compensation, nor is it the taking of property without due process of law.
6. Former opinion in this case, *ante*, p. 724, adhered to.

EPPERSON, C.

Our former opinion herein is published, *ante*, p. 724, to which reference is made for a statement of the case and for certain parts of an act of the legislature, the constitutionality of which is questioned. Desiring to further consider certain questions presented by this appeal, relators' motion for a rehearing was granted, and those questions were submitted to counsel. The third question related to estoppel of relators, and does not require a discussion here. It would be pertinent only in the event that we found against respondents upon all of the other propositions considered. The other questions are as follows: (1) Does the fact that each owner of real estate may cast a vote for each acre of land or town lot which he owns within the proposed district affect the validity of the act? (2)

Does the fact that nonresident owners, whether they be natural persons or corporations, are given voice in the election affect the validity of the act? * * * (4) Does the act by inference give to county boards the power to determine whether the proposed district and improvements will be for the benefit of the public health, convenience and welfare? (5) Is any discretion vested in the county board as to the formation of a drainage district, or must it fix the boundaries for a district when demanded in accordance with the provisions of the act, if it did not deem it wise to form any district in the vicinity?

We will first consider the fourth and fifth questions presented. The two may be disposed of together. It is well established by the great weight of authority that the drainage of swamp lands, and the construction of dikes and levees for the reclamation and protection of real property, may be provided for by legislation, and that the authority to make such improvements may be conferred upon municipal corporations, upon county boards, upon specially appointed officers, or upon districts which may be organized for that purpose. It is equally well settled that the machinery of the government will be thus placed in operation only when the contemplated reclamation or protection by drainage, or by the construction of dikes and levees and other similar improvements, are necessary in order to promote the public health, convenience or welfare, and that individuals cannot through the agency of the government thus improve their own property when the public health, convenience or welfare will not be promoted thereby. As a general thing, and with very rare exceptions, the government, by thus promoting the public health, convenience or welfare, will incidentally cast special benefits upon the property of individuals which is reclaimed or protected by such drainage or diking or other similar improvements, and it is the consensus of judicial opinion that for this reason the cost and the expense of such improvement may be taxed to the property thus receiving special advantage. Although the reclamation and

protection against flood waters, inundations and overflows are matters to which the government lends protection by the taxation of property and by the condemnation of property, yet it is necessary that some governmental agency must be invoked for the purpose of determining whether or not any proposed improvement will in fact promote the public health, convenience and welfare. That any such proposed improvement is one of public utility is a jurisdictional fact, and without its existence the government should refuse to lend its aid, and a law which will permit such improvement in any other case is unconstitutional and void, because it would permit the taking of private property to further private interests. Various legislative bodies have provided different laws and created various means for determining the question as to whether or not any proposed improvement by drainage or by the construction of dikes and levees would in fact be of public utility. More frequently this duty is conferred upon county boards of supervisors, occasionally upon officers specially provided for that purpose; referred to usually as "drainage commissioners"; but such matters are within the discretion of the legislature, and if it has prescribed a rule whereby the jurisdictional question may fairly be determined by a competent administrative body the law must be upheld, and proceedings had in conformity thereto will not be disturbed by the courts. Reference to our former opinion will disclose that the act of the legislature, which is assailed by the relators, recognizes that the improvements for which the act provides may be made only "whenever it will be conducive to the public health, convenience or welfare." The act provides for the presenting of a petition signed by the requisite number of freeholders who own land within the boundaries of a suggested district. Upon the presentation of such petition, the county board of supervisors shall take to its assistance the county surveyor, "and shall determine whether or not the boundaries of said proposed district are reasonable and proper, and, if said board find that the boundary line of said district

should be changed, they shall change the same and fix the boundary line where the same in the judgment of said board should be fixed with a view to promoting the interest of said drainage district, if formed, and with a view to doing justice and equity to all persons."

The fourth and fifth questions above quoted must be answered by an interpretation of this provision of the act in controversy. It is evidently the intention of the legislature that such improvement should not be brought about, except that it be for the public health, convenience or welfare. But is it possible that the specific provisions of the act may be complied with and the expressed intention of the legislature defeated? The county board itself views the property, taking to its assistance the county surveyor. It is not required to take testimony, but upon an examination of the vicinity of the suggested district determines the boundaries thereof. The board is not permitted to take into consideration the private advantage which would be gained by any individual; but, on the other hand, it shall fix the boundaries with a view to promoting the interest of the drainage district, and with a view to doing justice and equity to all persons, and this must necessarily be done with a consideration for the public health, convenience or welfare. Although drainage laws are liberally construed, yet we are of the opinion that a strict construction placed upon this act would not permit us to arrive at any other conclusion. The inference that the county board shall determine the public utility of the proposed improvement is not only permissible, but a necessary construction to be placed upon the language used. It is the board's imperative duty to act upon the presentation of a proper petition. It is not its imperative duty to fix the boundaries if the organization of the district would not promote the public health, convenience or welfare. Counsel for respondents argues, as also does counsel for relators, that the county board has no discretion in the matter; that it is required to fix the boundaries of the district regardless of the public health, convenience and

welfare; and that the question of public utility is to be determined by the owners of the property within the district. Were we to take his view of this proposition, we could not in all probability support the conclusion we have reached. Yet he admits that, acting under the provisions of the statute, it would be the duty of the county board to change the boundaries of the suggested district so as to include land the reclamation or protection of which would be of public utility, and that it would be the duty of the board to exclude such land, in the suggested district, the reclamation or protection of which would not promote such public interest.

The legislature is the author of the act. It appears from the arguments that the act was promoted by the respondents, their constituents, and their counsel. Their counsel drafted the bill for which the act was introduced, and, although he places a construction upon this provision inconsistent with ours, yet we must give to the act the meaning which it is apparent from the language used that the legislature had in mind when it passed it. We adhere to the construction set forth in our former opinion. The legislature might well have said in express terms that the county board should make a finding that the organization of the proposed vicinity would be of public utility; but the inference is strong, from the language actually used, that it was the intention of the legislature that the district should not be organized, except that the county board could prescribe such boundaries for the proposed district, which, if organized and promoted under the provisions of the act, would in fact promote the public health, convenience or welfare. The supreme court of Minnesota in *State v. Board of County Commissioners*, 87 Minn. 325, 60 L. R. A. 161, had before it for consideration a drainage act which contained no express provision making it the duty of the board to find whether the proposed ditch would be of public benefit, nor is there any express declaration in the act itself that such fact must exist before a ditch may be ordered constructed. In the opinion we find the

following: "From a very careful and painstaking examination of this act, we are satisfied that but one construction should * * * be given it, and that to the effect that the legislature intended to provide exclusively for the public welfare. It provides that the county commissioners may construct a ditch or drain, when they find the necessity therefor and that the other provisions of the act have been complied with. It provides that the petition shall state the necessity for the ditch, and this must necessarily refer to and mean the public necessity, for only public ditches are authorized to be laid out by the act. No assessments upon lands benefited can be made, except toward the payment of a public ditch; and the theory that a private ditch may be ordered constructed under its provisions is impliedly negated by almost every section of the statute. Section 31 was undoubtedly embodied therein for the very purpose of indicating that the legislature intended it to apply exclusively to cases where the public health, convenience, or welfare will be advanced. This section provides 'This act shall be liberally construed, so as to promote the public health and the drainage and reclamation of wet or overflowed lands.'" In *Oathout v. Seabrooke*, 159 Ind. 529, it is said: "The seizure of private property by the state, through county commissioners, for the construction of highways and ditches, is an assertion of the right of eminent domain, which can be exercised only in cases where some public benefit is to be subserved. The commissioners have no power to enter upon lands, lay out and construct roads and ditches, when only private interests are involved, and no power to act upon such subject until they have first ascertained, by the means provided by law, that some public benefit is to be promoted thereby."

The act confers upon the property owners of the district the privilege of organizing the district for the purposes of improvement, but, as we view it, the election is not held to determine the question of public utility. The county board does that. The result of the election could

not change this fact. It is true that the act says: "If a majority of the votes cast at said election shall be in favor of the formation of said district it shall be conclusive that the formation of said district, and the work that may be done under the supervision of the board of directors, will be for the public health, convenience and welfare." Laws 1907, ch. 153, sec. 8. Were it not for the action of the county board in fixing the boundaries with a view of forming a district, the improvement of which would promote the public welfare, we would quite agree with relators' counsel that the act is fatally deficient. The election is called only after the jurisdictional question of public utility is determined, and for this reason alone can the election be considered as conclusive that the reclamation or protection of the district will be for the public health, convenience or welfare. It would not stand for this even, unless all jurisdictional provisions had been in good faith complied with. The only purpose for requiring an election is, first, to give to the property owners the privilege of availing themselves of the statute, and thereafter to select officers of the district. The legislature might have provided for the organization of a district without an election. As will be seen by authorities hereinafter cited, legislatures of some states have conferred upon county commissioners the power to construct drains without giving to interested property owners any vote whatever, either by petition or by ballot, and such legislation has been enforced by the courts. Our legislature could constitutionally confer upon the county board the power to create a drainage district upon a petition of the property owners, who represent the greater portion of the property within the district, if upon investigation the board find that the public welfare would be subserved. It is immaterial that the act now before us failed to provide for this expression from the property owners before the determination of the jurisdictional question by the county board. The county board had authority to consider the question by reason of a petition filed by comparatively a few of the interested

property owners. And acting upon this it proposed a district, the improvement of which would be of public utility.

Then it was that the question of organization was submitted to the interested property owners. Nor is it fatal to the act, nor can we even say that it was unwise legislation, to permit all the property owners, regardless of their location, and although they might be foreign corporations, to have a voice at the election. In fact, it seems fair and reasonable, when the public interest, and not private, is to be promoted by improvements to be paid for by special taxation according to benefits, that all persons, regardless of their place of residence, should have a voice, and their influence be determined by the amount of their holdings. Section 22 of the bill of rights provides: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Const., art. I. The act under consideration does not call for an exercise of the elective franchise such as is provided for in the constitution. It prescribes a manner by which the property owners may determine what persons shall have charge of the intended improvements. The directors provided for by the act are not public officers, in the sense that they have charge and control of the political affairs of their constituents. This is one of several modes resorted to by the different legislatures in providing a manner for the organization of drainage districts. The formation of the district is not for the purpose of government, but for the purpose of constructing a public improvement, after the proper governmental body has determined that the same would be of public utility. As heretofore said, the law might have provided for the improvement of the district at the expense of the benefited property, without giving to the property owners any vote whatever. Such being possible, it seems immaterial what manner of voting is prescribed, when the legislature sees fit to give that privilege. By an act of the general assembly of Iowa it was provided

that the drainage of land subject to overflow or too wet for cultivation could be established upon a petition of 100 voters of the county. It was not required that any of the petitioners should be the owners of, or interested in, the land in controversy, nor did the act provide that the wishes of the landowners should be considered in the establishment of the proposed drain. *Seibert v. Lovell*, 92 Ia. 507; *Butts v. Monona County*, 100 Ia. 74. In *Roberts v. Smith*, 115 Mich. 5, the act made no provisions for notice and hearing to the persons within the assessed district or the property owners liable to assessment, and it was held that this omission from the act did not violate the constitutional requirement against the using of private property for public improvements without the consent of the owner, unless compensation shall first be determined by a jury of freeholders, and it was further held that said act did not authorize the taking of property without due process of law, in that it makes no provision for such notice and hearing. In *Mound City Land & Stock Co. v. Miller*, 60 L. R. A. 190 (170 Mo. 240), it was held: "Basing the voting power in a drainage district on acreage, rather than on membership, is not unlawful." In *People v. Reclamation District*, 48 Pac. 1016 (117 Cal. 114), it was held: "That the law creating reclamation districts provides that those who are interested in the land and who must pay for the improvements shall determine by an election whether the improvements shall be made, does not constitute an exercise of the elective franchise, so as to render it void because requiring a property qualification." In the opinion it is said: "The district, as already said, was part of a scheme for conducting a public work, and not for self-government. In regard to street work and other local improvements, it has often been provided that the work shall only be done upon the application of the owners of a majority of frontage, or of a certain proportion of the owners of land; and, if the law had provided that the owners could elect a committee of their number to superintend the work, I do not see how it could change the principle.

This could not constitute an exercise of the elective franchise, which is the matter to which the constitutional provisions have reference. The general public has an interest in the reclamation of swamp and overflowed land. Nevertheless, it is one of those public enterprises which results in a benefit to private lands, and therefore the costs are made a charge upon such land. That those who are specially interested and who must pay for the improvement are heard upon the question as to whether it shall be done, and are permitted to appoint those who shall superintend it, is not unusual, nor would it constitute an exercise of the elective franchise." 117 Cal. 114.

The act here in controversy, instead of providing a notice and hearing to the property owners for the purpose of determining the jurisdictional question as to public utility, provided another manner by which the county board should ascertain that fact—by personal examination and investigation, with the assistance of the county surveyor. It is not necessary for this court to determine which plan is the better. The one adopted is adequate. The mere establishment of a drainage district does not deprive any property owner of his property, does not impose taxes against his property, and in no way does it violate his constitutional rights. The question of taxation and assessment is determined by the officers of the district, when it is once organized. They are required by the act to levy the necessary taxes upon the property benefited in proportion to the benefits received, and of this assessment each property owner has notice—is granted a hearing, with the right to appeal. In this system of taxation, and in this only, is there an opportunity to do an injustice to any person concerned, and, if the invasion of any rights is threatened, he has an opportunity to correct it, as other wrongs done in violation of the revenue laws of the state are corrected.

There was a sixth proposition argued upon the rehearing; but, in view of the conclusion we have reached, a discussion thereof is unnecessary. It would be important

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only in the event that the court should find that the property owners had the power to determine the jurisdictional question of public utility.

We are convinced that our former conclusion is right, and we recommend that the opinion heretofore filed be adhered to and the judgment of the lower court affirmed.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

**JAMES G. WHITE, APPELLANT, v. NICHOLAS RESS, SHERIFF,
ET AL., APPELLEES.**

FILED FEBRUARY 20, 1908. No. 15,075.

1. **Judgment: REVIVOR.** Section 462 of the code is applicable to the revival of a dormant judgment, and authorizes the revival of such a judgment against a nonresident upon service by publication.
2. ———: ———: **CONSTITUTIONAL LAW.** Section 462 of the code, authorizing the revival of a dormant judgment upon service by publication, is not repugnant to either the state or federal constitutions.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

A. J. Sawyer and Joseph Wurzburg, for appellant.

O. B. Polk and H. J. Whitmore, contra.

GOOD, C.

This action was brought to enjoin the sale of real estate upon execution. A demurrer to the petition was sustained, and the cause dismissed by the trial court, and the plaintiff has appealed to this court.

The petition discloses that the plaintiff is the owner of

certain real estate in Lancaster county, that one of the defendants is the sheriff of said county, and the other two are the owners by assignment of a certain judgment. The judgment was originally obtained in Gage county on the 26th day of March, 1897. Thereafter it was assigned to one of the defendants, and was permitted to become dormant. The assignee of the judgment caused a transcript of the same to be filed in Lancaster county on July 22, 1905, and on the same day made and filed in the office of the clerk of the district court for said county an affidavit alleging the facts necessary to entitle him to a revival of the judgment. Thereupon a conditional order of revivor was made by the court. An ineffectual attempt was made to serve this order upon the judgment debtor in the state of Illinois. On the 24th day of July, 1905, the attorney for the assignee filed an affidavit for service by publication. On the 11th day of September, 1905, the conditional order of revivor was made absolute upon this constructive service. In April, 1906, the judgment debtor, being then the owner of certain real estate in Lancaster county, conveyed the same by warranty deed to the plaintiff and appellant in this action. Execution was issued and levied upon the real estate so conveyed, and it was advertised for sale. Thereupon the plaintiff instituted this action to enjoin the sale.

It will be observed that the plaintiff became the owner of the real estate after the revivor proceedings, and, if they were effectual, the judgment was a lien upon the real estate. Appellant contends that the revivor proceedings were ineffectual, because no personal service of the conditional order was had upon the judgment debtor, that service by publication was ineffectual to authorize the court to make the order reviving the judgment, and that, therefore, the judgment was not a lien upon the realty levied upon. The real point in controversy is as to whether or not a judgment of revivor can be rendered against a non-resident upon service by publication. Section 473 of the code provides that, "if a judgment become dormant, it may

be revived in the same manner as is prescribed for reviving actions before judgment." The mode of reviving actions before judgment is prescribed by sections 459 to 462, inclusive. Section 462 is in the following language: "When the plaintiff shall make an affidavit that the representatives of the defendant, or any of them in whose name the action may be ordered to be revived, are nonresidents of the state, or have left the same to avoid the service of the order, or so conceal themselves that the order cannot be served upon them, or that the names and residence of the heirs or devisees of the person against whom the action may be ordered to be revived, or some of them, are unknown to the affiant, a notice may be published for four consecutive weeks, as provided by section seventy-nine, notifying them to appear on a day therein named, not less than ten days after the publication is complete, and show cause why the action should not be revived against them; and, if sufficient cause be not shown to the contrary, the action shall stand revived." Appellant contends that this section is not sufficient to authorize service by publication in the revival of a dormant judgment, and that it is necessary to read into this statute other language in order to make it apply to the revival of a dormant judgment. It is contended that the section is not applicable, because it requires the affidavit to be made by the plaintiff, that service by publication is conditional upon the filing of the affidavit, the contents of which are prescribed by the statute, and that they deal with the representatives of the defendant, heirs and devisees; and it is urged that, if the judgment had been obtained by a defendant upon a counterclaim or set-off, he could not come within the provisions of the section because he was not the plaintiff. So far as these objections are concerned, we think they are purely technical and without merit. Section 473, as above quoted, provides for the revival of a dormant judgment, and that it shall be in the same *manner* prescribed for the revival of actions before judgment. It is the manner of doing it that is prescribed, and the manner prescribed is that,

where the persons against whom the revivor is sought are nonresidents of the state, or have left the same to avoid the service of the order, or so conceal themselves that the order cannot be served upon them, a notice may be published for four consecutive weeks, as provided by section 79, notifying them to appear on a day therein named and show cause. We are of the opinion that the legislature clearly intended that this section should apply to the revival of dormant judgments, and that service by publication might be made upon a nonresident judgment debtor.

The appellant further contends that, even if this was the intention of the legislature, still it was nugatory because it is contrary to the provisions of both the state and federal constitutions, in that it deprives a party of his property without due process of law. The basis of this contention is that the proceeding to revive is an action *in personam*, and that the order of revivor is a personal judgment, and that a personal judgment cannot be rendered except where the court has jurisdiction of the person of the defendant, either by appearance or by personal service upon him within the state. The appellee contends that the order of revivor is not the entering of a personal judgment. In the determination of this question, it is, perhaps, well to consider the nature of a dormant judgment and the nature of revivor proceedings. In *Draper, Matthis & Co. v. Nixon*, 93 Ala. 436, 8 So. 489, it is said: "A judgment not satisfied, or barred by lapse of time, but temporarily inoperative, so far as the right to issue execution is concerned, is usually called a dormant judgment." The validity of the judgment for the purpose of having execution upon it is not impaired by lapse of time whereby it has ceased to become a lien upon real estate. Such an execution is only voidable. *Yeager v. Wright*, 112 Ind. 230. Our own court has held that a sale upon execution issued upon a dormant judgment is not subject to collateral attack. Without citing further authorities, it is apparent that a judgment does not become extinct by the lapse of time, but is only temporarily inoperative. It may

well be doubted whether under our statute dormancy has any more effect than to cause the judgment to cease to be a lien upon real estate. The proceeding to revive the judgment in this state is not a new action, nor an original suit, but is a continuation of another action. The object to be sought by the revivor is to affect the status of the judgment theretofore properly rendered. It will not be doubted that the legislature might have provided that a judgment should never become dormant, or that it should never cease to be operative until satisfied. It has provided the means whereby the holder of a judgment might prevent its becoming dormant, without the consent of or notice to the judgment debtor, by the simple expedient of having an execution issued within five years of the date of the judgment, or within five years of the issuance of a previous execution. It would seem to us that it would have been entirely competent for the legislature to determine that a judgment would become dormant after the lapse of a certain time, and should remain so until the judgment creditor should file in the court an affidavit setting forth that the judgment was unpaid, and that this would entitle him to have the judgment revived, and that such proceeding might be wholly *ex parte*. The effect of dormancy, at most, raises only a presumption of payment, and does not extinguish the debt or extinguish the liability of the defendant upon the judgment. No one questions that the judgment might be kept alive by the issuing of executions as provided for by our statute, and by simply issuing successive executions the judgment might be kept in full force for an indefinite length of time. Therefore, upon reason, it seems to us that it was proper for the legislature to provide for the revival of dormant judgments upon service by publication, and that such provisions are not repugnant to the provisions of either the federal or the state constitutions. We have not been favored with the citation of, nor have we been able to find, any authority that is expressly in point. Appellant has cited us, however, to the

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case of *Bickerdike v. Allen*, 157 Ill. 95, in which there is a dictum to the effect that a proceeding in *scire facias* to revive a dormant judgment was not one *in rem*, and that constructive service upon a nonresident is insufficient to sustain an order of revivor in such a proceeding. Upon the other hand, constructive service is held valid in such a case in *Bertron v. Stuart*, 43 La. Ann. 1171, and there appears a dictum in the case of *Neal v. Le Breton*, 14 Okla. 538, to the effect that service by publication upon a nonresident is sufficient in proceedings to revive a dormant judgment. The statute of Oklahoma is almost identical with our own. A similar dictum also appears in *Bartol v. Eckert*, 50 Ohio St. 31. Many of the states have statutes similar to our own for the revival of dormant judgments upon service by publication as against nonresidents. While these authorities are not conclusive, they, at least, show the trend of the judicial mind in the consideration of the subject.

We are therefore of the opinion that the judgment was properly revived, and was a lien upon the land when purchased by the appellant. It follows that the judgment of the district court is right, and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WILLIAM W. STEPHENS, ADMINISTRATOR, APPELLANT, v.
HOSMER H. HENDEE ET AL., APPELLEES.

FILED FEBRUARY 20, 1908. No. 15,085.

1. **County Judges: BONDS: LIABILITY OF SURETIES.** Sureties on the official bond of a county judge are not liable for money which did not come to the possession of their principal by virtue of his office.

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2. ———: ———: ———. Where a county judge receives and takes possession of personal property belonging to the estate of a deceased person prior to the appointment of an administrator, his act in receiving and taking possession of the personal property is not done or performed by virtue of his office; and the sureties upon his official bond are not liable if their principal subsequently converts the property so received and taken to his own use.

APPEAL from the district court for Saline county: LESLIE G. HURD, JUDGE. *Affirmed.*

R. M. Proudft, F. I. Foss and R. D. Brown, for appellant.

Hall, Woods & Pound, George H. Hastings, Norval Bros. and J. E. Addie, contra.

GOOD, C.

Plaintiff, as administrator, brought this action against Hosmer H. Hendee, former county judge, and his official bondsmen, to recover certain funds and the value of a certificate of deposit belonging to plaintiff's intestate, which, it was alleged, said Hendee had received by virtue of his office as county judge and had converted to his own use. Hendee made default. His bondsmen answered, denying that the fund and certificate were received by Hendee in his official capacity as county judge. The trial court directed a verdict for the defendant bondsmen, and for the plaintiff against the defendant Hendee, and rendered judgment accordingly. From that judgment the plaintiff has appealed.

From the record it appears that one Smith died intestate, possessed of a small sum of money and a certificate of deposit for \$3,300. The coroner was called to investigate the cause of his death, but found no occasion for holding an inquest. It appears that Smith had no relatives in that community, and the coroner took possession of the money and certificate, which he found upon the person of the deceased. The coroner then wrote to the county judge asking his advice as to the disposal of the property. In

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response to this inquiry Hendee informed the coroner that the property should be turned over to the county judge, that he, as county judge, was the proper custodian of the property, and procured the possession of it from the coroner. A few days later application was made for the appointment of an administrator of the estate of Smith. Pending this application Hendee indorsed the certificate as county judge, and attempted to deposit it to his credit as county judge in one of the banks of Friend. The banker observed that Hendee's indorsement was insufficient, and informed Hendee that it would be necessary to have the certificate indorsed by the administrator. A few days later the plaintiff was appointed administrator of Smith's estate, and upon the same day that he qualified as such administrator Hendee fraudulently procured him to sign an indorsement of the certificate of deposit. It appears that at the time the administrator signed the indorsement he did not know what he was signing, and that he had no intention or purpose of transferring the certificate to Hendee as county judge. Very shortly afterwards the plaintiff learned that he had indorsed the certificate of deposit, and that the same had been deposited in the bank to the credit of Hendee as county judge. He thereupon made demand upon Hendee for the money, and subsequently brought this action to recover it.

The appellant urges that Hendee received the money and certificate by virtue of his office as county judge, or, at least, under color of office, and that in either event, upon his failure to account for the property so received, his bondsmen would be liable. He further urges that the act of Hendee in procuring the administrator to indorse the certificate was in effect an official act, directing the disposition of the estate of a decedent which was being administered in the county court. Appellant grounds his contention upon the theory that the county court has exclusive jurisdiction of probate matters, and the county judge is the only person who has any authority to order or direct the disposition of the personal property of decedents, and

that in some way the county judge had control over and was exercising an official function in directing the indorsement of the certificate to himself, and that, therefore, the bondsmen are liable for the failure of the county judge to account for and pay over the proceeds of the certificate of deposit. Upon the other hand, the appellees contend that the circumstances under which the county judge came into possession of the money and the certificate were not sufficient to constitute a receiving by virtue of his office, and that, as the administrator never had possession of the personal property and no order was ever made by Hendee as county judge, Hendee received the money and property as an individual, or, at most, under color of office, and his bondsmen are not liable. Appellant contends that the bondsmen are liable, even though the money was received only under color of office, and that the distinction that has heretofore existed between acts done under color of office and those done by virtue of office is no longer considered sound in law. *Hall v. Tierney*, 89 Minn. 407, particularly lends support to this view. But the rule prevailing generally, and particularly in this state, is different. In this state the rule is that sureties on official bonds do not undertake to answer for acts done by their principal under color of office, but only for such acts as are done by virtue of his office. *State v. Porter*, 69 Neb. 203; *Ottenstein v. Alpaugh*, 9 Neb. 237; *State v. Holcomb*, 46 Neb. 612; *State v. Moore*, 56 Neb. 82; *Comstock-Castle Stove Co. v. Caulfield*, 1 Neb. (Unof.) 542; *Snyder v. Gross*, 69 Neb. 340. "Where an officer goes out of the line of his official duty, and acts without the scope of his authority, this action, though done *colore officii*, is not a breach of his bond for the faithful performance of his duty." *State v. McDonough*, 9 Mo. App. 63. In *Wilson v. State*, 67 Kan. 44, it is said: "As a general proposition, the obligation of a surety is *strictissimi juris*. The surety has the right to stand upon the letter of his obligation. That defendants, as sureties upon the official bond of Wilson as county attorney of Rawlins county, are liable only for such sums

of money as he might lawfully receive by virtue of his office as county attorney is too well settled to admit of argument." In Meachem, Public Officers, sec. 284, is clearly pointed out the distinction between acts done by virtue of office and those done under color of office, in the following language: "Acts done *virtute officii* are where they are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them."

The condition in the bond which is particularly relied upon for a recovery in this case, and which, we think, is the only one under which the bondsmen could be held under any circumstances, is in the following language: "Now, if the said Hosmer H. Hendee * * * shall promptly pay over to the person or officer entitled thereto, all money which may come into his hands by virtue of his said office," etc. It is a rule universally recognized that sureties on official bonds can only be held for such liability as comes within the letter of their contracts. The bond in this case holds the sureties only for acts done by virtue of office, and not under color of office, and they are not liable in this case, unless it can be said that Hendee received the money and certificate of deposit by virtue of his office. Under no circumstances that we can conceive of is the county judge entitled to the custody of the personal effects of a decedent prior to the appointment of an administrator. The record clearly discloses in this case that Hendee obtained possession of the money and the certificate prior to the application for the appointment of the administrator. Under no circumstances could he have had any jurisdiction as county judge to compel or require the property to be placed in his hands. He had obtained possession of the money and certificate by misrepresentation of the law to the coroner, and, while this act may have been under color of his office, yet it was not by virtue of his office.

Appellant further contends, however, that the procuring of the administrator's indorsement upon the certificate of deposit after he had qualified was an official act of the county judge, done by virtue of his office, and that the sureties are liable for the proceeds of the certificate of deposit. We think this contention ill-founded, because the record shows that no order was made by the county judge, and, in fact, the indorsement of the administrator was procured by fraud; he at the time not knowing that he was indorsing the certificate, and not intending thereby to transfer it to the county judge. Hendee already had possession of the certificate, and did not obtain possession by this act, and, even if he had obtained possession of it by this fraud, it was not by any act or purported act as an officer. The language used in *State v. Cottle*, 26 Cir. Ct. Rep. (Ohio) 238, is applicable here. It is there held that the sureties on an official bond are not liable for moneys unlawfully appropriated by him to his own use after it has improperly come into his possession. The money and certificate both improperly came into the possession of Hendee in this case, and a subsequent conversion of the funds to his own use would not render his sureties liable.

Some complaint is made that the court directed a verdict, instead of submitting the facts to a jury for its determination; but this is not strenuously urged, nor do we see how it could be, because the verdict directed was the only one that could be sustained. The facts were not in dispute, and there was no question of fact to submit to the jury, and the court directed a verdict as a matter of law, because the sureties were not liable.

It follows that the judgment of the district court is right, and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOHN SEBESTA ET AL., APPELLEES, V. SUPREME COURT OF
HONOR, APPELLANT.

FILED FEBRUARY 20, 1908. No. 15,412.

1. Evidence examined and *held* sufficient to sustain the verdict.
2. **Insurance: ACTION ON BENEFIT CERTIFICATE: DEFENSES.** In an action to recover upon a benefit certificate issued by a fraternal insurance association, whose constitution contains a clause making the certificate incontestable after two years, except for violation of the constitution or laws of the order, and wherein the death of the assured member did not occur within two years of the issuance of the certificate, in order to sustain a defense on the ground that the assured committed suicide, it is necessary to allege and prove that death by suicide is a violation of the constitution or laws of the order in force at the date of the assured member's death.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

W. B. Risse and A. L. Tidd, for appellant.

Matthew Gering, *contra.*

GOOD, C.

This action was brought against the Supreme Court of Honor, a fraternal insurance association, by the beneficiaries of a certificate of membership issued by said association to Anton Sebesta. The defendant alleged that Sebesta committed suicide by eating the heads of parlor matches, and that under the constitution of the defendant association it was not liable when the assured member committed suicide. Plaintiffs had judgment for the amount of the certificate, which was afterwards reversed by this court. 77 Neb. 249. Upon a second trial of the cause in the district court the beneficiaries again recovered a judgment for the amount of the certificate, with interest, and the defendant has appealed to this court.

Although there are numerous assignments of error, they

relate principally to the sufficiency of the evidence to sustain the verdict, and to the instructions given and refused by the trial court. The record discloses that Sebesta became a member of the defendant association and received his membership certificate in May, 1898, and that he came to his death on the 14th day of July, 1903. It discloses that he was of a cheerful disposition, and had no apparent cause or desire to take his own life. About a month previous to his death he had suffered an injury, from which he had apparently nearly recovered. He had been making his home with friends, whose home he left about a week before his death, when he went to a near-by neighbor. At this time he was ill, and complained of a headache and pains in his abdomen. After he left his home a box of parlor matches was found near the barn with the heads off. At the neighbor's, where he stayed for a day or two, in the room which he had occupied, was found a box of matches with the heads partly missing. This neighbor asked Sebesta about the matches, but he neither admitted nor denied eating them, but looked down and said: "I am just so well off now as on top of the ground." This neighbor advised him to see a doctor, which he did. It appears that he consulted three different physicians, and made every effort to get relief from his illness, and expressed a great desire to recover and live. The physician who last attended him testified that, in his opinion, Sebesta died of phosphorus poisoning. The evidence shows that Sebesta exhibited a number of symptoms of phosphorus poisoning, while, on the other hand, a number of symptoms that usually attend phosphorus poisoning were entirely absent. The first physician who treated Sebesta after the match episode diagnosed his case as the first stage of typhoid fever. There was no direct evidence that Sebesta ate any of the match heads. The record does not disclose that Sebesta knew that the heads of parlor matches contained phosphorus, or that they were poisonous. From a consideration of all the evidence in the case, we think that a jury might have been justified in finding

that Sebesta died of phosphorus poisoning, but we do not think the evidence is such as to compel such a finding. It certainly falls far short of conclusively showing that, even if Sebesta did eat the match heads, he thereby intended to commit suicide, and the court did not err in refusing to direct a verdict upon that ground.

Section 2, art. X of the constitution of the Supreme Court of Honor, in force at the time Sebesta became a member of the association, is as follows: "This order will not pay the benefits of members who commit suicide, whether sane or insane, except it be committed in delirium resulting from illness, or while the member is under treatment for insanity, or has been judicially declared to be insane; but, in all cases not within said exceptions, the amount of money contributed to the benefit fund by such member, shall be returned, and shall be paid to the beneficiaries out of said fund in lieu of the benefit."

Section 13 of the constitution then in force is in the following language: "After two years certificates of membership shall be incontestable for any cause except fraud, violation of the constitution or laws of this order, or a failure to pay the assessment for the benefit and general funds as provided by the laws."

From a consideration of the section first quoted, it would appear that the beneficiaries would not be entitled to recover, if Sebesta committed suicide within two years of the date of his membership certificate, for it was stipulated that he was not in a delirium resulting from illness, that he was not under treatment for insanity, and that he had not been judicially declared insane at the time he was supposed to have eaten the match heads. His death occurred more than five years after he became a member, and, under section 13 above quoted, it is extremely doubtful whether or not the defense of death by suicide was eliminated. It is not necessary to decide that question, for a reason which we will now state.

It appears that this constitution had been superseded by a new constitution which became effective in the year

1900, and which, so far as appears from the record, was in force at the time of Sebesta's death. By the adoption of the new constitution, the old one was abrogated and annulled. The record discloses that section 13, containing the incontestable clause, was carried forward in the newly adopted constitution, but the record is silent as to whether or not section 2, art. X, above quoted, was contained in the new constitution. Upon this state of the record, the membership certificate would be incontestable after two years, save in those cases falling within the exceptions designated in the incontestable clause. There is no evidence in the record that any clause in the constitution in force at the time of Sebesta's death was violated, or that any of the laws of the order were violated, and it was stipulated that all assessments for the benefit and general funds had been paid as provided by the laws of the order. For the appellant to avail itself of any defense that might exist by reason of the exceptions in section 13 of the constitution, it would be necessary for it to allege and prove that Sebesta had violated some of the provisions of the constitution or some of the laws of the order. Appellant has assumed that, because the constitution in force at the time the certificate was issued contained the suicide clause, as above quoted, the defense of suicide was available to it under the exceptions contained in the incontestable clause. In this we cannot concur. When the old constitution was abrogated by the adoption of the new one, it was the same as if it had never existed, and we are not at liberty to presume, in the absence of any evidence, that the suicide clause was carried forward or re-enacted into the new constitution. It therefore follows that, upon the state of the record as it existed, suicide did not constitute a defense.

The instructions complained of relate to the alleged misdirection of the court in defining suicide, and in the refusal to instruct the jury with reference to the defense of suicide as requested by the appellant. We have examined these instructions, and think that they properly state the law. But in the view that we have heretofore expressed,

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that suicide did not constitute a defense, as shown by the record, it is not necessary to further consider the instructions.

There is no reversible error in the record, and the judgment of the district court should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion the judgment of the district court is

AFFIRMED.

T. G. NORTHWALL COMPANY, APPELLEE, v. MARY K. OSGOOD,
APPELLANT.

FILED FEBRUARY 20, 1908. No. 15,050.

1. **Husband and Wife: MARRIED WOMAN'S CONTRACTS.** The syllabus in *Farmers' Bank v. Boyd*, 67 Neb. 497, reaffirmed, and *held* to be the settled doctrine of this court.
2. ———: ———: The construction placed by this court upon the married woman's act, in *Grand Island Banking Co. v. Wright*, 53 Neb. 574, reaffirmed and *held* to be the settled doctrine of this court.
3. ———: **NOTES: INNOCENT PURCHASER.** A purchaser for value, before maturity, of a promissory note, signed by a married woman, cannot invoke the rule of innocent purchaser, as against the defense of coverture, by showing simply that he had no notice or knowledge of such coverture at the time he purchased such note.

APPEAL from the district court for Johnson county:
JOHN B. RAPEL, JUDGE. *Reversed.*

D. F. Osgood, for appellant.

E. R. Hitchcock, *contra*.

FAWCETT, C.

Plaintiff, T. G. Northwall Company, sued upon a combination chattel mortgage note, executed May 22, 1902,

and payable on or before April 1, 1903, to W. P. Atkins, or bearer, at his office in Sterling, Nebraska. The petition alleges that on the 19th day of January, 1903, Atkins indorsed said note, and for a valuable consideration, in the usual course of business, delivered the same to plaintiff, and that plaintiff became the owner of said note before maturity, without notice, and is an innocent owner of said note. To this petition, defendant, Mary K. Osgood, filed her answer, in which she alleges, among other things: "(2) This defendant alleges that she is a married woman, living with her husband, Daniel F. Osgood, and has been for the 19 years last past. (3) Defendant alleges that she did not sign the note sued on with the intention of binding her separate property or estate, nor was the consideration for said note used for the benefit of her separate property or estate. (4) Defendant alleges that the note sued on was signed at the request of her husband, above named, for the payment of one gasoline engine purchased by him of one W. P. Atkins." Then follow a number of other allegations to which it is not necessary to refer. No reply whatever was filed to this answer. Such being the state of the record, then, under the well-settled practice in this state, defendant was entitled to a judgment on the pleadings. No motion for such a judgment was interposed, however, but the parties proceeded to trial to the court, a jury having previously been waived. After hearing the evidence and arguments, the court found in favor of the plaintiff, and entered judgment against the defendant for the amount of the note and interest, aggregating the sum of \$105. A motion for new trial was duly filed and overruled, and the case is here for review.

Even if we give plaintiff the benefit of a reply denying generally the allegations of defendant's answer, on the theory that defendant went to trial without raising the question of the absence of such reply, we must still reverse the judgment of the trial court. It is no longer an open question that "it is the settled doctrine of this court that the signing of a promissory note by a married woman

does not raise the presumption that she intended thereby to render her separate estate liable for its payment, nor that it was given with reference to her separate property, trade, or business, or upon the faith and credit thereof; and to an action upon such note coverture is a complete defense, unless the plaintiff shall establish by a preponderance of the evidence that the note was made with reference to, or upon the faith and credit of, the wife's separate estate or business, or with an intention on her part to charge her separate estate with its payment." *State Nat. Bank v. Smith*, 55 Neb. 54; *Grand Island Banking Co. v. Wright*, 53 Neb. 574; *Farmers Bank v. Boyd*, 67 Neb. 497.

The evidence contained in the bill of exceptions shows that the note in controversy was given by defendant in payment of a gasoline engine that had been sold by Atkins to defendant's husband. Defendant testified that she was a married woman, and living with her husband; that, when she signed the note, she did not intend to bind her separate property any further than as it was written in the note, which could mean nothing more than that the gasoline engine named in the mortgage clause of the note might be held as a pledge for the payment of the same. Plaintiff places great reliance upon two questions propounded to defendant by the court, and her answers thereto, viz.: "Q. By the Court. Who bought the gasoline engine? A. Mr. Osgood bought it. Q. Whose was it after it was bought; was it yours or his? A. I suppose it was mine, my name was attached to the note." There is nothing in the record to show where the engine was used, or for whose benefit. This is all of the evidence in any manner tending to show that defendant was dealing with reference to her separate estate. In our opinion it falls far short of being sufficient to establish that fact.

The uncontradicted evidence shows that before plaintiff purchased the note in suit, one of its representatives took it, with other notes, to the Farmers & Merchants Bank, and inquired of the cashier, the witness Boatsman, as to the responsibility of the makers of such notes. Mr. Boats-

man told him that the note in suit was good, but that Mr. Osgood (husband of defendant) claimed that Atkins, the original payee, owed him something, and that there was a dispute between them. The evidence also shows that plaintiff did not become the holder of the note by an ordinary purchase, but took it from Atkins in payment of an open account, and gave him credit on account for the amount of the note. There can be no doubt but that plaintiff's representative was trying to collect a claim which plaintiff held against Atkins, and that he knew when he took the note in suit that the maker was a married woman and the wife of D. F. Osgood, who was disputing with Atkins the payment of it. Under these circumstances, we do not think plaintiff can be held to be an innocent purchaser without notice.

Conceding that plaintiff purchased the note, for value, before maturity, and without notice of any defenses, we must still hold that such facts cannot overcome the defense of coverture interposed and established by defendant. In *De Gaalon v. Matherne*, 5 La. Ann. 495, it is said: "The plaintiff insists that, though this note might not have been good in the hands of the original holder, yet in those of a subsequent holder for a valuable consideration the wife cannot resist the payment. This question came before the supreme court in the case of *Sprigg v. Boissier*, 5 Mart. (n. s.) 54, and was decided in favor of the wife. Conceding that the consideration of a negotiable note transferred before maturity cannot be gone into in an action by the indorsee, the court in that case correctly held that, when the objection to the contract arose from the incapacity of a party to enter into it, that which had not a binding effect when it was made cannot acquire it by indorsement. The note showed upon its face that the maker was a married woman. This was sufficient to put the plaintiff upon inquiry before he discounted it, and it was incumbent upon him to ascertain that the separate estate of the wife could be charged with it." If plaintiff's representative, at the time he took the note from Atkins, knew that plaintiff

was a married woman, plaintiff would be bound by such knowledge as effectually as if the note showed upon its face that the maker was a married woman, and would therefore come within the rule announced in the above case.

We think the defense of coverture is analogous to that of minority. It will not be claimed that a purchaser for value, before maturity, of a promissory note signed by a minor, could evade the defense of minority by showing want of knowledge of the maker's age; and it seems to us that the defense of coverture should be governed by the same rule. In each case, the infirmity in the note is the want of capacity of the maker. In the one case, the note is voidable under the settled law of this state, and, in the other, it is void as at common law, the statute not having enlarged a married woman's capacity to contract generally. *Grand Island Banking Co. v. Wright*, and *Farmers Bank v. Boyd*, *supra*. In *Englebert v. Trorell*, 40 Neb. 195, 212, we said: "And besides there is no such thing as an innocent purchaser of a minor's property." The reason for that rule rests in the absolute right of the minor to disaffirm all contracts, other than for necessities, made while under the disability of infancy. In like manner there can be "no such thing as an innocent purchaser of a married woman's note," because of the absolute right of a married woman to disaffirm all contracts executed while under the disability of coverture, which are not made with reference to, and upon the faith and credit of, her separate business or property. We therefore hold that a purchaser for value, before maturity, of a promissory note, signed by a married woman, cannot invoke the rule of innocent purchaser, as against the defense of coverture, by showing simply that he had no notice or knowledge of such coverture at the time he purchased such note.

We recommend that the judgment of the district court be reversed and the cause remanded for further proceedings in harmony herewith.

AMES and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings in harmony therewith.

REVERSED.

OMAHA FURNITURE & CARPET COMPANY, APPELLEE, v.
MORRIS MEYER, APPELLANT.

FILED FEBRUARY 20, 1908. No. 15,068.

Parties: SUBSTITUTION. Plaintiff H. J. A., sole proprietor of a business which he conducted under the name of "Omaha Furniture & Carpet Company," commenced an action in replevin in justice court under said name. Before trial in the justice court his request to substitute his individual name as plaintiff was denied. On appeal to the district court the request was renewed and the substitution permitted. *Held* proper practice. Code, sec. 144.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

W. S. Shoemaker, for appellant.

G. W. Shields, *contra*.

FAWCETT, C.

This case is here for the second time. On its first appearance in this court it appeared under the title of "*Morris Meyer, Plaintiff in Error, v. Omaha Furniture & Carpet Company, Defendant in Error.*" 76 Neb. 405. Meyer was defendant and the Omaha Furniture & Carpet Company plaintiff in the court below. In the briefs filed by both sides on this hearing the parties are again designated as "*Omaha Furniture & Carpet Company v. Morris Meyer*," but in the assignments of error, and in the præcipe filed on this hearing by defendant Meyer, the case is entitled "*Omaha Furniture & Carpet Company and Henry*

J. Abrahams, Substituted Plaintiff, v. Morris Meyer." An examination of the petition of plaintiff in the court below discloses the fact that the title as given by defendant in his præcipe is substantially correct; but a literally correct statement of the present parties would be "*Henry J. Abrahams v. Morris Meyer.*"

This was an action in replevin instituted originally in the name of the *Omaha Furniture & Carpet Company v. Morris Meyer et al.* before a justice of the peace in Douglas county. In the justice court the point was made by defendant that plaintiff was not the real party in interest, and had no legal capacity to sue. Plaintiff asked leave to substitute the name of Henry J. Abrahams as party plaintiff, claiming that he was the real party in interest; that he was doing business in the name of the Omaha Furniture & Carpet Company, and was the sole owner and proprietor of the business conducted under such name. This request was denied in the justice court, and judgment rendered for the defendant. Plaintiff appealed to the district court, in which court a petition was filed in which it was attempted to state facts sufficient to show the authority of the plaintiff under the name of the Omaha Furniture & Carpet Company to maintain the action. Defendant filed a motion to strike the petition from the files upon the ground that it showed on its face that plaintiff was not the real party in interest. This motion being overruled, defendant was given leave to demur *instante*, and he did so, alleging as grounds of demurrer that plaintiff had no legal capacity to sue; that the petition showed upon its face that it was not prosecuted in the name of the real party in interest, and that the petition failed to state a cause of action against the defendant. The demurrer was overruled, and judgment entered in favor of plaintiff, from which judgment the defendant appealed. This court reversed the judgment of the court below, and remanded the case "for further proceedings according to law." In the opinion by OLDHAM, C., it is said: "When the cause was removed by appeal to the district court,

plaintiff did not ask leave to substitute Abrahams as the plaintiff in the cause of action, but, on the contrary, filed a petition in which he plainly attempted to state facts sufficient to show the authority of the Omaha Furniture & Carpet Company to maintain the action in its own name." When the case was remanded to the district court, defendant moved the court to sustain the demurrer which he had interposed prior to the former appeal, and for judgment of the district court in his behalf, "based on the mandate and opinion of this court on file in the case." Before this motion was disposed of, plaintiff moved the court to substitute Henry J. Abrahams as plaintiff. The district court overruled defendant's motion for judgment, and granted plaintiff leave to make the desired substitution. Plaintiff thereupon, by leave of court, filed an amended petition in the name of Henry J. Abrahams as plaintiff, in which he alleged "that for many years last past he has conducted, and still conducts, his business under the name of the Omaha Furniture & Carpet Company, and that said Henry J. Abrahams and Omaha Furniture & Carpet Company are one and the same person; that he is sole owner and proprietor of said Omaha Furniture & Carpet Company; that said business is the buying and selling of furniture, carpets, draperies, and all sorts of household furnishings; that said Omaha Furniture & Carpet Company is not incorporated, and consists solely of the said plaintiff, Henry J. Abrahams; that at the commencement of this suit he was, and ever since has been, and still is, the owner of the following described goods and chattels, to wit" (naming the articles set out in the replevin suit). The defendant moved the court to strike out of the amended petition the name of Henry J. Abrahams as party plaintiff, and to affirm the judgment entered in the justice court against the Omaha Furniture & Carpet Company, and also to strike from the files the amended petition filed in the name of Henry J. Abrahams, for various reasons stated in said motion. The district court overruled the motion, whereupon defendant refused

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to plead further, electing to stand upon his motion. Judgment was thereupon entered in favor of the plaintiff, and from that judgment defendant prosecutes the present appeal.

Defendant rests his right to a reversal of the judgment of the court below on *Flanders v. Lyon & Healy*, 51 Neb. 102, on the strength of which case this court reversed the case on the former hearing. We do not think *Flanders v. Lyon & Healy* is in point on the present hearing. In that case an attempt was made to substitute an entirely different party plaintiff, the motion being for leave to substitute P. J. Healy as plaintiff in place of the firm of Lyon & Healy, "for the reason that the note and mortgage on which this action is based have been assigned to said P. J. Healy, who now owns the same." This court very properly held that "in a replevin suit, where the plaintiff has taken the property, it is error to permit a stranger to be substituted for the original plaintiff over defendant's objection." On the former hearing of this case no question of the right of substitution was raised. The point in controversy then was that plaintiff's petition on its face failed to show the capacity of the Omaha Furniture & Carpet Company to sue. The question now before the court is: Did the court err in permitting the substitution of Henry J. Abrahams as plaintiff in lieu of the Omaha Furniture & Carpet Company? The amendment allowed simply permitted the correction of the name of the plaintiff; the name "Omaha Furniture & Carpet Company," under which Abrahams did business, having been used as the name of the plaintiff instead of Mr. Abrahams' individual name. This was not permitting the substitution of a stranger, but was simply permitting the correction of the name.

Section 144 of the code reads: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a

party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code, the court may permit the same to be made conformable thereto, by amendment." Under this statute we think the district court would have the right to permit an amendment, such as was made in this case, at any time, either before or after judgment. In *Brandt v. Albers*, 6 Neb. 504, this court said: "Where, upon the death of a plaintiff, there is an order of revivor in the name of the administrator duly entered, the failure of the clerk to change the title of the case accordingly is not fatal to the judgment subsequently rendered. This is a mistake that may be remedied on motion, even after judgment." And in *Pekin Plow Co. v. Wilson*, 66 Neb. 115, it was held that "in this state the right to amend is as liberally accorded in replevin actions as in other causes." In *McDonald v. State of Nebraska*, 101 Fed. 171, it is said: "There is no such thing as a vested right in a technical error or defect in the pleadings or the parties to the action. No error or defect can be regarded which does not affect the substantial rights of the adverse party. * * * At this day the party who seeks to profit by an error or mistake in pleading must be able to invoke the principle upon which the law of estoppel is founded." The amendment permitted by the district court certainly did not affect the substantial rights of the defendant. Henry J. Abrahams was the Omaha Furniture & Carpet Company, and *vice versa*. The lease under which plaintiff was claiming the right to take the property was executed in the name of Omaha Furniture & Carpet Company, but the parties all well knew that the Omaha Furniture & Carpet Company was really Henry J. Abrahams. The substitution of Henry J. Abrahams as plaintiff, therefore, was no more a change of the real parties than if the suit had been commenced in the name of J. Henry Abrahams, and, upon

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discovery of the clerical error after the suit was commenced, plaintiff had been permitted to change the name to Henry J. Abrahams. Henry J. Abrahams commenced the suit, had prosecuted it from the beginning, and was the sole owner of the property and cause of action, but, by inadvertence or mistake, had commenced the suit under a wrong name. The court did not err in permitting the amendment.

If what defendant states in his brief as to the character of plaintiff and the merits of the controversy in this action, if they had been gone into, is true, it is to be regretted that defendant did not file his answer and proceed to trial upon the merits; but, having elected to stand upon what he believed to be his technical rights, and having permitted judgment to go against him, we do not see how we can relieve him from the situation in which he has permitted himself to be placed.

We recommend that the judgment of the district court be affirmed.

CALKINS and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

NATHAN C. GOODRICH, APPELLEE, v. UNIVERSITY PLACE ET AL., APPELLANTS.

FILED FEBRUARY 20, 1908. No. 15,083.

1. **CITIES: CARE OF STREETS: LIABILITY.** The making, improving and repairing of streets by a municipal corporation relate to its corporate interests only, and it is liable for its failure to perform its duty.
2. ———: **PRIVILEGES: OBLIGATIONS.** By accepting the special privileges and powers of taxation, supervision and local government, cities of the second class and villages assume the duties, responsibilities and liabilities flowing therefrom and incident thereto in the same manner and to the same extent as any other muni-

city; and such special privileges and powers constitute a sufficient consideration for the obligations and liabilities thus assumed.

3. —: CARE OF STREETS: LIABILITY. A city of the second class or village has the exclusive control of its streets, and ample means are placed under the control of its constituted authorities to maintain the streets in a safe condition. Under these circumstances, it is liable for its failure to perform its duty.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Affirmed.*

T. M. Wimberley and Wilson & Brown, for appellants.

R. D. Stearns and Billingsley & Greene, contra.

FAWCETT, C.

The petition in this case alleges substantially that University Place is a city of the second class and Bethany Heights a village, each duly organized and existing as such under the laws of this state, and that under the laws of this state it was the duty of appellants to keep the streets of such city and village in good order, and at all times to keep the bridges in good repair, and to place barriers and railings along dangerous embankments and declivities along the streets within their corporate limits; that Vine street or the Vine street road lies within the corporate limits of said defendants, and as a part of said road there was a bridge which was allowed to get out of repair and so remain; that there was a dangerous embankment near the bridge without barriers or railings or other protection, which was permitted to remain in such dangerous condition, and that plaintiff, while driving along and over said street and bridge, by reason of the defective and dangerous condition of the bridge and embankment, was thrown out of his wagon and down the embankment, and injured. There was a trial to a jury, which returned a verdict in favor of plaintiff for \$500. From a judgment on the verdict this appeal is prosecuted.

Counsel for appellants in their brief state: "We wish

to submit this case in this court upon the single proposition of the liability of cities of the second class and villages in this state for negligence in failing to keep their streets and bridges in repair. * * * If the law imposes such a liability the appellants are content with the verdict and judgment; but they contend that under the law the facts stated in the petition impose no liability upon them, and for this reason they ask that the judgment be set aside and the cause of action dismissed." Counsel for appellants plant themselves squarely upon the doctrine that the common law imposes no liability upon either counties, townships, school districts, or municipalities for injuries to individuals growing out of defective highways, and that, such being the fact, no such liability exists unless imposed by statute; that such right in the individual as against the public is in derogation of the common law, and does not exist unless it is conferred by express terms of the statute, or by necessary implication from the terms of such statute, and that in this state there is no statute granting any such right in express terms as to cities of the second class and villages, nor any statute concerning them from the terms of which it can be said that such liability may be implied. The law governing cities of the second class and villages, in force at the time of the injury complained of, is found in article I, ch. 14, Comp. St. 1905. The sections of that chapter bearing on the question under consideration are as follows:

Sections 21 and 67b. "The overseer of streets shall, subject to the orders of the mayor and council (board of such village), have general charge, direction, and control of all work on the streets, sidewalks, culverts, and bridges of the city (or village), and shall perform such other duties as the council (board) may require (direct)."

"Section 69. In addition to the powers hereinbefore granted cities and villages under the provisions of this chapter, each city and village may enact ordinances or by-laws for the following purposes: * * * Subd. III. To provide for the grading and repair of any street,

avenue or alley, and the construction of bridges, culverts and sewers. * * * Subd. IV. To construct sidewalks; to curb, pave, gravel, macadamize and gutter any highway, street, avenue or alley therein (to grade from lot line to curb line of its streets and highways for sidewalks and parks; to park any highway, street, avenue or alley, and to maintain parks thereon); and to levy a special tax on the lots and parcels of land abutting on such highway, street, avenue or alley, to pay the expenses of such improvements. But, unless a majority of the resident owners of the property subject to the assessment for such improvements petition the council or trustees to make same, such improvements shall not be made until three-fourths of all the members of such council or board of trustees shall by vote assent to the making of the same."

"Section 77. The city council or board of trustees shall have the care, supervision, and control of all public highways, bridges, streets, alleys, public squares, and commons within the city or village, and shall cause the same to be kept open and in repair, and free from nuisances."

We are unable to discover any substantial difference between the powers and privileges given to, and obligations and liabilities imposed upon, cities of the second class and villages, and municipalities of any other class. The same rules of law must therefore be applied to all. In their brief counsel for appellants rely upon *Goddard v. City of Lincoln*, 69 Neb. 594; *Schmidt v. City of Fremont*, 70 Neb. 577; *City of Detroit v. Blackeby*, 21 Mich. 84, together with the quotation therein from *Eastman v. Meredith*, 36 N. H. 284, and *Roberts v. City of Detroit*, 102 Mich. 64. We do not think either of the Nebraska cases cited is in point here. In *Schmidt v. Fremont* the only questions considered were whether a party who had been injured by a defective sidewalk was required to give notice to the mayor or city clerk within 30 days after the occurrence of the accident or injury; and, second, whether incapacity, caused by his injury, to give the notice would be a sufficient excuse for noncompliance. We decided the for-

mer of those two questions in the affirmative, and the latter in the negative. Nothing else was considered or decided in that case. In *Goddard v. City of Lincoln* the question was whether, under section 110, art. I, ch. 13, Comp. St. 1901, the city of Lincoln could be held liable for injuries unless a notice in writing of the defect causing the injury had been filed with the city clerk at least five days before the injury occurred. We held that the legislature had a perfect right to thus limit a person's right to recover against a city. In the first paragraph of the syllabus it is said: "The liability of a city, for injuries resulting from defective streets or sidewalks, rests exclusively upon express or implied provisions of the statute, and it is competent for the legislature to limit such liability or remove it entirely." That such power is vested in the legislature there is no room for doubt; but that case does not decide that a municipality is not liable to one who is injured by reason of the negligence of such municipality in keeping its streets and sidewalks in reasonably safe condition for travel, unless such liability is imposed by statute. Indeed, we think there is force in the argument of counsel for appellee that "the language of the court implies that there is a liability now, as a liability could not be 'limited' or 'entirely removed' if it did not exist." We have read the opinion with great care, and are unable to find anything in it to sustain the position of appellants in this case. On the contrary, on page 597, the opinion cites *City of Omaha v. Olmstead*, 5 Neb. 446, and says: "The principle announced in that case has since been frequently applied." An examination of *City of Omaha v. Olmstead* shows that the question under consideration in this case was squarely before us in that. In the opinion we say: "It will not be denied that an act providing for the incorporation of a city must be accepted as a whole, and that the city in accepting the benefits derived therefrom must perform the duties required by law. The corporate franchise is a valuable privilege, and is a sufficient consideration for the duties which the law imposes. The state

grants to the municipality a portion of its sovereign authority, in greater powers of self-government than are given to *quasi* corporations, in increased facilities for the acquisition and control of corporate property, and in the special authority over, and control of, the streets, and their adaptation to the wants and convenience of the citizens of the municipality. The acceptance of these privileges is considered as raising an implied promise on the part of the city to perform its corporate duties; and this implied agreement made with the sovereign power inures to the benefit of every individual interested in the proper performance of such duties (citing a number of cases). The city has the exclusive control of its streets, and ample means are placed under the control of its constituted authorities to maintain the streets in a safe condition. Under these circumstances, the city is liable for its failure to perform its duty." The opinion then considers *City of Detroit v. Blackeby*, *supra*, and the quotation which the Michigan court therein makes from *Eastman v. Meredith*, *supra*, upon which appellants chiefly rely. In this connection the opinion states: "In *Detroit v. Blackeby*, 21 Mich. 84, 114, it was held (Cooley, J., dissenting) that the city was not liable. The court say: 'In the case of *Eastman v. Meredith*, 36 N. H. 248, the distinction between the English and American municipal corporations is clearly defined. The former often hold special property and franchises of a profitable nature which they have received upon conditions, and which they can hold by the same indefeasible right with individuals. But American municipalities hold their functions merely as governing agencies.' While it is true that in particular instances property and valuable franchises of a profitable nature were conferred upon municipal corporations as a condition for the performance of certain acts, yet it will not be contended that all, or any considerable portion, of such corporations were thus endowed. Nor will it be claimed that liability for neglect of duty was restricted to corporations thus benefited. I think it will be found on examination

that, as a rule, as valuable privileges and benefits are conferred by our laws providing for the incorporation of cities as were conferred by ancient charters."

The above, then, is "the principle announced," which, in *Goddard v. City of Lincoln*, *supra*, we say "has since been frequently applied." Our dissent from the rule announced in *City of Detroit v. Blackeby*, *supra*, and the other Michigan cases cited, does not stand alone. The supreme court of the United States in *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440, say: "It is denied that a municipal corporation (as distinguished from a corporation organized for private gain) is liable for the injury to an individual arising from negligence in the construction of a work authorized by it. Some cases hold that the adoption of a plan of such a work is a judicial act, and, if injury arises from the mere execution of that plan, no liability exists. *Child v. City of Boston*, 4 Allen (Mass.), 41; *Thayer v. City of Boston*, 19 Pick. (Mass.) 511. Other cases hold that for its negligent execution of a plan good in itself, or for mere negligence in the care of its streets or other works, a municipal corporation cannot be charged. *City of Detroit v. Blackeby*, 21 Mich. 84, is of the latter class, where it was held that the city was not liable for an injury arising from its neglect to keep its sidewalks in repair. The authorities establishing the contrary doctrine that a city is responsible for its mere negligence are so numerous and so well considered that the law must be deemed to be settled in accordance with them." Mr. Justice Hunt, who wrote the opinion, then gives a long line of English and United States authorities sustaining his position. It will be seen, therefore, that *City of Detroit v. Blackeby*, *supra*, is not only discredited by this court in *City of Omaha v. Olmstead*, *supra*, but is declared by the supreme court of the United States to be contrary to the great weight of authority. In *Burke v. City of South Omaha*, 79 Neb. 793, we again had occasion to consider *City of Omaha v. Olmstead*, *supra*, and *Barnes v. District of Columbia*, *supra*, and, upon such consideration,

the rule announced in *City of Omaha v. Olmstead* was reaffirmed. In the opinion in that case DUFFIE, C., very clearly draws the distinction which is decisive of this case, in these words: "When the state imposes upon an incorporated city the absolute duty of performing some act which the state may lawfully perform, and pertaining to the administration of government, the city, in the performance of that duty, may be clothed with the immunities belonging to the mere agent of the state; but, when the city is merely authorized by way of special privilege to perform such an act in part for its corporate benefit and the benefit of its inhabitants, the city is not clothed with these immunities, and is liable to be sued for injuries inflicted through its negligence in the performance of such an act." The syllabus of that case states the rule thus: "The making, improving and repairing of streets by a municipal corporation relate to its corporate interests only, and it is liable for the wrongful or negligent acts of its agents in performing such duties." Adapt the phraseology of that syllabus to the facts in the case at bar, and we have the rule: The making, improving and repairing of streets by a municipal corporation relate to its corporate interests only, and it is liable for its failure to perform its duty. In that case the negligence of the defendant consisted of the negligence of its foreman while repairing one of its streets; in the case at bar the negligence consisted of the failure of defendants to repair the street. As will be seen, the rule is the same in either case.

While the exact question of the liability of cities and villages, without an express statute creating such liability, and the rule at common law in relation thereto, has, so far as we have been able to discover, never been considered in this court except in *City of Omaha v. Olmstead*, *supra*, we have in numerous cases held such cities and villages liable in the absence of such express statute. In *City of Ord v. Nash*, 50 Neb. 335, it is said: "Where a city or other municipality grades or otherwise improves

any portion of a street for the purpose, and with the result, of inducing public travel thereon, there is a resulting duty to keep such portion of the street in repair and a consequent liability for the failure to do so." In *Wahoo v. Reeder*, 27 Neb. 770, we say: "A person passing over a public sidewalk in a village, which sidewalk was elevated from one to three feet above the ground, stepped into a hole in such walk and was permanently injured. Held, That a village was liable for such injury in the same manner as a city." In *Village of Ponca v. Crawford*, 23 Neb. 662, the village was held liable for an injury sustained by a stranger who, while passing along one of its streets between the post office and one of the principal hotels, was injured by reason of a break in the sidewalk. In *City of Plattsmouth v. Mitchell*, 20 Neb. 228, where the sidewalk from which the injury resulted was constructed on a public street by an abutting property owner, without any direction or order by the officers of the city, we held: "The fact of such construction by the property owner without authority will not relieve the city from liability for damages to persons injured thereon without fault, if after the construction of such walk the city assumes jurisdiction over it and orders repairs to be made prior to an accident. Nor will such city be relieved from liability, even though it does not assume such jurisdiction, if the walk is in a public street in constant use, and in a line of other sidewalks constructed by direction of the city, or over which it has control." As late as March 21, 1907, in *Brown v. Village of Pierce*, 78 Neb. 623, we reversed a judgment for defendant for errors in the instructions, and remanded the case for another trial, thereby sustaining plaintiff's right to maintain an action for injuries received by reason of a defect in the sidewalk. In none of the above cases was there any express statute making the cities and villages liable for their negligence in the care of their streets to persons injured by reason thereof. The rule in harmony with the weight of authority seems to be as stated by MAXWELL, J., in *City of Omaha v.*

Olmstead, supra, that a corporate franchise is a valuable privilege and is a sufficient consideration for the duties which the law imposes; that an act providing for the incorporation of a city or other municipality must be accepted as a whole, and that a city or other municipality in accepting the benefits derived therefrom must perform the duties required by law; that acceptance of these privileges is considered as raising an implied promise on the part of the city or other municipality to perform its corporate duties, and that this implied agreement made with the sovereign power inures to the benefit of every individual interested in the proper performance of such duties; that the city or other municipality has the exclusive control of its streets, and ample means are placed under the control of its constituted authorities to maintain the streets in a safe condition, and that under these circumstances the city is liable for its failure to perform its duty. Tersely stated, we hold that, by accepting the special privileges and powers of taxation, supervision and local government, cities of the second class and villages assume the duties, responsibilities and liabilities flowing therefrom and incident thereto in the same manner and to the same extent as any other municipality, and that such special privileges and powers constitute a sufficient consideration for the obligations and liabilities thus assumed.

We recommend that the judgment of the district court be affirmed.

CALKINS and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

EMMA HOSKOVEC, APPELLANT, v. OMAHA STREET RAILWAY
COMPANY, APPELLEE.

FILED FEBRUARY 20, 1908. No. 15,037.

1. **New Trial: MISCONDUCT OF JUROR.** Where a question as to the operation of physical laws is involved in a case, and a juror seeks the opinion of a person specially skilled in such matters, but not called as a witness, and communicates such opinion, when obtained, to his fellow jurors, such action of the juror is misconduct, for which the trial court may properly set aside the verdict.
2. **Trial: INSTRUCTIONS.** In a case where the defendant had the greater number of witnesses upon a material point, the court instructed the jury that the weight of evidence did not necessarily depend upon the number of witnesses who testified for the respective parties, but that it might consider the interest, intelligence, means of knowledge of the witnesses, the reasonableness of their statements, and the extent to which they were corroborated by other witnesses, and twice told it that the plaintiff must establish her issues by a preponderance of the evidence. *Held*, That it was improper to afterwards submit two additional instructions, in one of which the jury's attention was again called to the rule regarding a preponderance of evidence, and in the other of which it was told, without repeating the caution first given, that it might consider the number of witnesses.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Reversed*.

Weaver & Giller and F. T. Ransom, for appellant.

John L. Webster and W. J. Connell, *contra*.

CALKINS, C.

The plaintiff was a passenger on one of the defendant's cars going north on Thirteenth street, in the city of Omaha, September 22, 1902. She alighted at Dodge street, and in doing so she was seriously injured, and brought her action against the defendant, alleging that after the car was stopped, and while she was in the act of descending therefrom, the defendant's servants negligently started

the car, suddenly throwing her to the pavement and causing the injuries complained of. The defendant denied these allegations, and alleged that in fact the plaintiff negligently stepped from the car before it was stopped, and thereby received her injuries. The cause has been seven times tried in the district court. On the sixth trial there was a verdict for the plaintiff, which was set aside, and the seventh trial resulted in a verdict for the defendant. From a judgment rendered upon this verdict, the plaintiff appeals.

1. On the sixth trial the defendant produced several witnesses who testified that the plaintiff attempted to alight from the car by stepping from the running board with her face to the rear, while holding on with her right hand. It was claimed by the plaintiff that the character of her injuries demonstrated that she must have fallen forward, while she would naturally have fallen backward if the statements of defendant's witnesses were correct. One of the jurors, anxious, no doubt, to ascertain the truth, and probably unconscious of the impropriety of his undertaking an *ex parte* investigation upon his own initiative, interrogated one of the defendant's conductors as to how a person leaving a car in the manner described by defendant's witnesses before the same had been brought to a stop would probably fall; and, having received the answer that such person would sit down or fall backward, he communicated the result of his inquiry to his fellow jurors. This conduct of the juror being complained of by the defendant in a motion for a new trial, the district court on that account set aside the verdict, and its action in that regard is here assigned as error.

It will no doubt be conceded that a jurymen may not investigate any fact in issue on his own motion and communicate the result to his fellows. In this case the opinion of the conductor was placed before the jury without his having been produced or sworn as a witness, and without the defendant's having any knowledge of its

having been so submitted, and without giving it an opportunity to cross-examine the witness or controvert his testimony. This method of placing facts before the jury violates several fundamental principles of the law regulating the trial of issues of fact; but it is urged that the fact so brought to the cognizance of this jury, to wit, that a person leaving a street car under such circumstances would fall backward, is one concerning the ordinary course of nature, of which the jury might take notice without its being brought to its attention by the evidence. The facts of nature which may be so considered are those which are so plain that there can be no difference of opinion about them. The fact that the juror in this case desired and sought for the opinion of a person having special opportunities for observation of such instances tends to show that he felt unable to satisfactorily determine the question out of his own experience, and that he therefore might, and probably did to some extent, depend upon the information which he acquired in this irregular way. We are therefore of the opinion that the court did not err in granting a new trial upon this ground.

2. The trial court upon its own motion gave instructions which very fully and fairly presented the issues in this case to the jury. In the first instruction, the rule requiring the plaintiff to establish her allegations by a preponderance of the evidence was stated in a manner of which the defendant could not complain. In the second instruction, the jury were told that the only question for it to consider was: "Did the servants of the company in the charge of the car, after having brought the car to a stop at Thirteenth and Dodge streets, and while plaintiff was in the act of alighting therefrom, start said car forward, and thereby throw plaintiff upon the pavement and cause the injuries complained of, and was she injured thereby according to some of the claims made by her in her petition?" and the rule requiring a preponderance of the testimony was repeated to the jury in connection with this instruction. The third instruction was as fol-

lows: "The weight of evidence does not necessarily depend upon the number of witnesses who testify for the respective sides. In determining the question, you are at liberty to take into consideration the interest of the witnesses or any of them in the result of your verdict, their relationship to the parties in interest, if any, their intelligence, their means or opportunity of knowing the truth of the matter about which they testify, the reasonableness or unreasonableness of their statements, and the extent to which they are corroborated by other witnesses, if at all; you may consider the appearance and demeanor of the several witnesses while giving their testimony, and observe the candor and fairness with which they testify, or the want of those qualities, and determine for yourself the weight or credit to be given to the testimony of the several witnesses. If you believe any witness has knowingly or wilfully testified falsely, you are at liberty to disregard the whole of such witness' testimony, except such portion as may have been corroborated by other credible witnesses or evidence. You should not arbitrarily reject the testimony of any witness without just cause, but should seek to harmonize the testimony of all the witnesses on the hypothesis of truth, unless for good cause you are compelled to do otherwise."

The court also gave, at the request of the defendant, instructions numbered 2 and 5 as follows: "(2) You are instructed that it devolves on the plaintiff in this action to prove by a preponderance of the evidence that, while she was in the act of alighting from the car of the defendant, after it had been brought to a full stop, the car was suddenly started forward, and she was thereby thrown to the pavement and injured; and in that behalf you are further instructed that, if you find that the evidence in this case preponderates in favor of the defendant with regard to this allegation of negligence, or that the evidence as to whether or not the plaintiff was thrown from the car by the sudden starting forward of the same after it had stopped, or was caused by the plaintiff stepping or

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voluntarily going down from the car just before it came to a full stop, is evenly balanced, or does not preponderate either way, it will be your duty to return a verdict in favor of the defendant. (5) While it is true that the weight of evidence does not necessarily depend upon the number of witnesses who testify for the respective sides, yet it is proper for you to take into account and consider in determining any matter in controversy the number of witnesses giving testimony, and you should not arbitrarily reject the testimony of any witness without just cause."

It is contended by the plaintiff that these last two instructions repeated, emphasized, and brought into undue prominence the fact that the burden was upon the plaintiff to establish her case; and that the giving of the instruction numbered 5 was erroneous, as tending to lead the jury to ignore the quality of the evidence and consider only its quantity. The court in its instructions given upon its own motion had twice stated the rule requiring the plaintiff to maintain the issues by a preponderance of the evidence. In its third instruction it had properly cautioned the jury as to the matters it might consider in determining the weight of the testimony of the different witnesses. In reference to the number of witnesses, the jury were told that the weight of evidence did not necessarily depend upon the number of witnesses who testified for the respective parties; that it was at liberty to consider the interest, intelligence, means or opportunity of knowing the truth, and the reasonableness or unreasonableness of their statements, and the extent to which they were corroborated by other witnesses. The giving of the caution that the weight of evidence does not necessarily depend upon the number of witnesses has been frequently approved, and it is well settled that a court should not tell the jury that a preponderance of the evidence is to be determined by count of the witnesses. 2 Thompson, Trials, sec. 2422; Blashfield, Instructions to Juries, sec. 271. The justification for the rule permitting this caution to be given to the jury is to be found in the

disposition of the lay mind to settle disputes of fact by a mere count of witnesses, rather than by the more painstaking and laborious method of applying to the evidence the tests which human experience has found necessary to the discovery of the truth. When the jury were told that it was entitled, in weighing the testimony of any witness, to consider the extent to which it was corroborated by other witnesses, the defendant was given all the advantage to which it was entitled by the preponderance in number of its witnesses. The giving of the instruction numbered 5 was not only an unnecessary repetition, but in the form in which it was given it was calculated to neutralize the effect of the caution which the court had already given that the jury were not to determine the preponderance of the evidence by a count of the witnesses. The giving of this instruction in the form in which it appears was likely to disturb the operation of the minds of the jurors in judging the evidence, and to give them the impression that they might after all determine the weight of evidence by mere numbers. It is no doubt abstractly true that, everything else being equal, consideration should be given to the number of witnesses, but we doubt the propriety of introducing such language into the instructions. It is sufficiently brought to the attention of the jury when it is told that it may consider, in weighing the testimony of any witness, the extent to which such witness is corroborated by other witnesses. We are satisfied that the instruction should not have been given without the jury's attention being again called to the caution contained in instruction numbered 3, given by the court on its own motion. The giving of the instruction numbered 2, requested by defendant, was an unnecessary and erroneous repetition of the rule requiring the plaintiff to establish her case by a preponderance of the testimony. While, perhaps, not of itself sufficient to require a reversal of the case, it was improper; and, taken in connection with defendant's instruction numbered 5, was likely to

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mislead the jury. For the error in giving these two instructions, the case should be reversed.

As the other errors urged by the plaintiff are not likely to arise upon another trial, we do not deem it necessary to consider them.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

FAWCETT and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

EMIL SCHWANENFELDT, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 20, 1908. No. 15,182.

1. **Second Appeal: LAW OF CASE.** The decision of this court upon a former hearing of the same case is controlling only as to the actual point then determined.
2. **Trial: NEGLIGENCE: QUESTION FOR JURY.** Where the existence of a state of facts is undisputed, and where from such facts different minds might honestly draw different conclusions as to whether or not such facts established negligence, the question is for the jury to determine.
3. **Railroads: INJURY AT CROSSING.** A traveler by wagon approaching a point where it will be necessary to cross a railroad track laid in a public street has a right to anticipate that trains upon such track will be operated according to law, and without negligence on the part of the railroad company.
4. **—: STREET CROSSINGS.** A railroad company operating a train upon a city street, used in common by it and by pedestrians and vehicles, may be required to take precautions against collisions which are not necessary when it is operating trains upon its own right of way.
5. **Evidence examined, and found to present questions proper to be submitted to the jury.**

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

F. E. Bishop and Fred M. Deweese, for appellants.

Field, Ricketts & Ricketts, contra.

CALKINS, C.

The defendant owned and used a railroad track along Eighth street in the city of Lincoln, a street running north and south, and along the east side of block 52. The track in question was a switch put in for the accommodation of wholesale houses, and was connected with the company's yards at the south end only. At the point where the accident occurred, the west rail of the track was 17 feet east of the lot line. An alley 16 feet in width extended east and west through block 52, and was paved with stone. On the east side of the block, and immediately south of the alley, a lumber yard, inclosed with a high board fence, with an office building at the east end of the lot, obstructed the view, so that it was impossible for a person passing through the alley from west to east to see a train approaching from the south, except at the point at or near the east end of the alley where it intersects Eighth street. Between the buildings on the east side of block 52 and the railroad track there was nothing to obstruct the view to the south, except some telegraph poles. The plaintiff was driving a butcher's delivery wagon, drawn by a gentle horse, city broke. The seat on the wagon was at the front, flush with the end of the box, so that the driver occupying the same would sit with his feet resting on the foot-board extending out from the bottom of the box. The plaintiff was hauling meat from the supply house of a packing establishment, and had a companion who occupied the seat on the wagon with him. He drove through this alley from west to east at a jog trot. As he emerged upon Eighth street from the alley he was struck by a freight car, one of a train of 8 or 10 cars being

backed north upon the track in question. As a result of this collision he sustained injuries on account of which this action was brought. There was a judgment for the plaintiff upon the first trial, which was reversed by this court. *Chicago, B. & Q. R. Co. v. Schwanenfeldt*, 75 Neb. 80. A second trial was had, which resulted in another verdict for the plaintiff; and, from a judgment rendered upon this verdict, the defendant again appeals.

1. The defendant urges that the former decision of this court has become the law of the case and controls its determination upon this hearing. The record of the case before this court at the former hearing failed to show that the plaintiff looked as he emerged from the alley to see if a train was approaching; and the court held that, no excuse being offered for his failure to so look, he was guilty of contributory negligence as a matter of law. The record now before us shows that at the second trial the plaintiff testified that he expected a man to be there if a train was approaching, and that he looked to see if there was one as he approached the track, but discovered no one. He also testified that he saw the train as soon as he came from behind the lumber yard. A decision of this court at a former hearing is controlling only upon the actual point decided. In this instance the former determination was based upon the one fact that the plaintiff did not look for the approaching train. The evidence now shows that he did so look, and that decision is not applicable to the facts as now presented.

2. The question of negligence and contributory negligence is frequently a complex and difficult one, which can only be established by inference drawn from primary facts. The proneness of human minds to differ in the observation of primary facts increases in geometrical ratio when it becomes necessary to draw inferences therefrom; and whether certain conduct constitutes negligence is usually held to be a question peculiarly suitable to be submitted to a jury. The rule established by a multitude of cases is that, when the existence of a set of facts is un-

disputed, and where from such facts different minds might honestly draw different conclusions as to whether or not such facts established negligence, the question is one for the jury to determine. *City of Lincoln v. Gillilan*, 18 Neb. 114; *American Water Works Co. v. Dougherty*, 37 Neb. 373; *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27; *Omaha Street R. Co. v. Loehneisen*, 40 Neb. 37; *Chicago, B. & Q. R. Co. v. Pollard*, 53 Neb. 730.

3. Where, however, the facts are undisputed, and are such that reasonable minds can draw but one conclusion therefrom, it is a question for the court to decide, and it should do its duty fearlessly, not for the purpose of asserting its own prerogative, but in justice to the parties and the jury, which is put in a false position where it is directed to deliberate upon evidence from which it can reach but one possible conclusion. That the facts presented by the record in this case show such contributory negligence on the part of the plaintiff that a verdict should have been directed for the defendant is most insistently urged. In determining that question the first inquiry which presents itself to us is: What should the plaintiff have done in approaching the point of danger which he failed to do; or what did he do that he should not have done? That the degree of caution to be exercised by the plaintiff should have been proportioned to the degree of danger he should have anticipated will be generally admitted. In approaching this track the plaintiff was charged with taking account of the extent and character of the danger; but we think he was not required to anticipate that the defendant would operate a train upon this track in a negligent manner, considering all the surrounding conditions, nor fail to give such warnings of its approach as ordinary prudence demanded. *Continental Improvement Co. v. Stead*, 95 U. S. 161, 24 L. ed. 403; *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848; *Evansville & T. H. R. Co. v. Marohn*, 6 Ind. App. 646; *Crumpley v. Hannibal & St. J. R. Co.*, 111 Mo. 152; *Bunting v. Central P. R. Co.*, 14 Nev. 351; *Ernst v. Hudson River R. Co.*, 35

N. Y. 9; *Russell v. Carolina C. R. Co.*, 118 N. Car. 1098; *Stegner v. Chicago, M. & St. P. R. Co.*, 94 Minn. 166; *Sights v. Louisville & N. R. Co.*, 117 Ky. 436.

4. Since the degree of care to be required of the plaintiff depended upon the character of the danger he had to meet, it becomes necessary for us to inquire as to the manner in which ordinary prudence demands the defendant should use the track in question. A railroad company operating a train upon a city street, used in common by it and by pedestrians and vehicles, should exercise greater care to prevent collisions than when operating the same over its own right of way. *Norfolk & W. R. Co. v. Burge*, 84 Va. 63; *Cleveland, C., C. & I. R. Co. v. Schneider*, 45 Ohio St. 678. This is especially true where the use of such track is only occasional, and the distance to be traversed over the same is so short that there is no necessity for speed. If it is necessary to give warning by bell and whistle of the approach of trains regularly passing over its own right of way, it is certainly as important for the railroad to give such warning when operating its trains in a street used by it in common with the public; and if, as in this case, it is engaged in operating a train by backing, so that the engine is so far away that the ringing of the bell is useless, it would at least be a question for the jury whether some other means should not be adopted to give the necessary warning of the approach of its cars.

5. It appears from the evidence that the city ordinances restricted the speed of trains on this track to four miles an hour, and required warning to be given of the approach of trains by the ringing of the engine bell and the blowing of its whistle; that the train in question was being backed at the rate of five or six miles an hour; that the engine was so far away from the car that became the front of the moving train as to make a signal of its approach therefrom of little advantage; that no such signal was heard by the plaintiff or his companion; and that nothing else was done to warn travelers of the approach of the train. The

plaintiff was approaching on an up grade at a jog trot, and at a speed estimated by the witness Drake of four miles an hour. It was not possible for him to see an approaching train until he passed the lot line and was within 17 feet of the track, so that his horse's head would be very nearly at the point of contact with a passing car at the earliest instant at which the train became visible to him. To say that this evidence establishes the contributory negligence of the plaintiff as a matter of law, we must hold, first, that the plaintiff should, in the exercise of ordinary prudence, after the moving train came into view, have stopped his horse or jumped from his wagon in time to avoid the collision; or, second, that it was incumbent upon him to stop and look for an approaching train before he drove into the street. It seems to us that the question whether he might have stopped his horse in time, or jumped from the wagon or otherwise avoided the collision after coming in view of the train, was one about which different minds might honestly disagree, and therefore proper to be submitted to the jury. If the cars were moving at the rate of six miles an hour, and the horse at the rate of four miles an hour, the cars were approaching the south line of the alley at the rate of 8.8 feet a second, and the horse was approaching the defendant's track at the rate of 5.86 feet a second, and the plaintiff had probably less than one second to act upon the warning given him by the sight of the cars. It is a matter of common knowledge that the time required to respond to such warnings varies in different individuals and under different circumstances. Dr. Bolton, professor of psychology at the university of Nebraska, was sworn as a witness, and his evidence showed that by actual measurement from one-eighth to one-half a second is required to respond to an expected warning by those possessing the quickest mental and physical action; that response to an unexpected warning takes much longer; that response to a warning through the eye is slower than when the warning is through the ear; that if the warning threatens danger it may produce

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temporary paralysis of the muscles and delay action; and that the quickest persons only require about one-third of the time to respond to a warning demanded by those of slower perception. We think that different minds might honestly draw different conclusions as to whether the plaintiff was guilty of any negligence after arriving at a place from which he could see the approaching train. We are not prepared to hold as a matter of law that it was incumbent upon the plaintiff to stop and look before entering upon the street. The rule that a traveler must stop and listen and look before crossing when approaching a railroad at an ordinary crossing has not been adopted in this state; and it certainly should not be applied to the crossing of a railroad switch laid in a public street. We think the plaintiff was justified in relying upon the lack of warning of an approaching train, and that a jury might well hold that ordinary diligence, as well as a due regard for human life and limb, requires a railroad company while using the public streets of a city to give adequate notice of the approach of its trains; and that it would not be unreasonable to say that, in a case where it was backing trains so that the signal from the engine would be ineffective, such trains should be preceded by a flagman, or other means taken to warn the passers-by of their approach.

In the defendant's assignment of error complaint is made of certain instructions, but these objections were not discussed upon the argument, the case being submitted upon the questions hereinbefore considered. We have, however, examined the instructions complained of, concerning which it is only necessary to say that they seem to us to be in accord with the views at which we have arrived.

We therefore recommend that the judgment of the district court be affirmed.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

EUGENE C. KENDRICK ET AL., APPELLEES, v. HOWARD G. FURMAN, APPELLANT.

FILED FEBRUARY 20, 1908. No. 15,044.

1. **Evidence:** OPINIONS OF WITNESS. Where it is claimed that the construction of a dam has caused the bed of a river to fill in with silt and the water of the river to back up, so as to interfere with the operation of a water-wheel, a question calling for the opinion of the witness upon the very matter in issue is improper, and the answer thereto should be excluded.
2. ———: DAMAGES. Where one claims his property has been damaged by certain acts of the defendant, it is not proper to ask the witness in what manner he has been damaged, but he should state the facts, and the jury will then in the exercise of its functions find whether the litigant has been damaged.
3. Evidence examined, and held to entitle appellees to an injunction against appellant.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed in part.*

A. W. Crites, for appellant.

J. E. Porter, contra.

ROOT, C.

This was an action brought to the district court for Dawes county by appellees for an injunction and judgment for damages against appellant. It seems that A. J. Palmer and another in 1887 acquired title to a tract of land bisected by the Niobrara river. In 1892 and 1893 Palmer constructed an irrigation plant and water power mill upon his land, so as to receive the water from the said river to supply both his power for the mill and water

for his ditches. The state board of irrigation in 1898 made an order stating that Palmer & Company were entitled to seven and one-seventh cubic feet of water a second for irrigation purposes, dating by way of priority from August 1, 1887, and to 10 cubic feet a second of water for power purposes from August 1, 1893. Appellant owns land on each side of the Niobrara, and just immediately east of and below the land owned by Palmer. In January, 1894, appellant posted a notice of his proposed diversion of the water of said river for irrigation purposes, filed a copy thereof with the county clerk in February following, and on the 2d day of January, 1895, filed his claim with the state board of irrigation, which board thereafter passed upon and allowed said claim to the extent of three and nine-fourteenths cubic feet of water a second of time. In the spring of 1894 appellant and said Palmer conferred about the construction of a dam to enable appellant to divert water for an irrigation system. Palmer desired that the dam be constructed above the outlet of his (Palmer's) tailrace, but appellant refused, for the admitted reason that he wanted the dam and head gate on his own land, and further desired the benefit of the water returned to the river through Palmer's tailrace. Appellant then selected a site, and requested Palmer to survey for the ditches, dam and head gate. This point, following the thread of the stream, was about one-half mile below the mill, but in a direct course was considerably less. It seems to have been the mutual desire of appellant and Palmer that the dam be so constructed as not to interfere with the operation of the mill. The water for the mill was diverted something over a mile above the mill site, and was conducted thereto in a ditch or race so constructed that at the mill a very considerable fall was produced by permitting the water to flow down, upon, and over a turbine wheel, and thence through a draft tube to the tailrace, whence it escaped back to the river. The water-wheel was firmly attached to a shaft upon which a belt-wheel was affixed. On the ground at the head of the

tailrace, under the penstock, was a platform foundation of timber, the floor of which was 12 inches higher than the bed, and this floor seems to have been the initial point from which Palmer took his levels in surveying for appellant's dam. It was apprehended by Palmer that the dam constructed below his mill would back the water up so that, instead of the waste water flowing free from the water-wheel, and thence into the river through the tailrace, it would be retarded in its flow, back up and collect so as to interfere with the action of the water and the pulley-wheel. Palmer then, so he claims, indicated a level to which appellant might raise his dam and still leave a fall of 18 inches from the initial point to the top of the water flowing over the dam, which Palmer deemed sufficient. The dam, ditches and head gate were constructed, and for a time the mill was operated without interference from backwater or ice. In 1890 appellees purchased the mill, irrigation and other water rights from Palmer, and it is claimed by appellees that subsequently thereto appellant raised his dam, and in consequence thereof the waters of the river were backed up so that they submerged the lower part of the water-wheel and pulley, caused the belt to slip, interfered with the free discharge of the water through the draft tube and tailrace, and brought about such a condition as that the mill could not be operated. Furman denied raising his dam to a greater height than indicated by Palmer's survey, and claims that he has a license from Palmer, which is binding on appellees, to maintain the dam in the situation it was at the time the suit was commenced. He also claims that the piling of a wagon bridge constructed across the river at a point between the water wheel and the dam, the existence of a bend in the river, and the washing down from the canyons of debris into the river just above the bridge, caused the condition now existing. The cause was submitted to a jury, which returned a general verdict for the appellees, awarding them \$250 damages. Ten special findings were returned, and thereafter the court made special findings

upon which it entered an injunction perpetually restraining appellant from maintaining the top of his dam to a greater height than 18 inches below the top of the floor of appellees' penstock. Judgment was rendered on the verdict, and Furman appeals.

1. Upon the trial to the jury, the witness Hazard, over appellant's objections, was permitted to answer the question: "Now, what causes this sand, if you know, Mr. Hazard, to back up there?" He answered: "Well, there is only one thing I could reasonably account for; that is, the dam preventing the flow of the water carrying the sand off." The witness Poole, over appellant's objections, was permitted to answer the question: "Now, do you know what caused this water to back up this way?" He said: "From Mr. Furman's dam." The questions include the very substance of the issue to be determined by the jurors, and the acceptance by them of those answers relieved the jurors from ascertaining from competent evidence the very fact at issue in the case. The testimony invaded the province of the jury, and should not have been permitted. *Combs v. Agricultural Ditch Co.*, 17 Colo. 146; *In re Estate of Cheney*, 78 Neb. 274.

Over appellant's objection, one of the appellees was permitted to answer the question: "Now, you may tell the jury what damage you have suffered by reason of this water being backed up the way you have described during these three years?" The response was: "Why, it has been considerable damage from our grinding, and in getting across back and forth during the winter, and it has ruined our water place, which is a great deal. We have lost several head of cattle; the water would rise up over the ice and then go down again, and we have lost several head of cattle, which was no small loss." Appellant moved to strike out the answer as incompetent, irrelevant, immaterial, remote and speculative. The court sustained the motion only as to the loss of the cattle. Further in the witness' examination he was permitted to say appellees had suffered damage by reason of the water submerging the

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public road and the land between their house and the road, and, further, over objections as to competency, materiality and relevancy, he was permitted to answer the question: "Now, in what way did you suffer damages?" And in answer said: "We had the school teacher boarding there, and from time to time we had to carry her across so she could go to school." Appellant moved to strike out the answer as not a proper measure of damages, which was overruled, and the witness continued that the teacher "left and went to boarding some place else," and this answer the court refused to suppress. Not only did these questions permit the witness to assume he had been damaged, an issue of fact for the jury to determine, but their language was so general that opposing counsel could not possibly anticipate the answer that might follow, and thereby interpose an objection to answers responsive to the question, and yet incompetent and immaterial. The answers well illustrate the possibilities lurking in that class of interrogations—that their watering place had been ruined; that they had lost several head of cattle, and a school teacher had gone elsewhere to board. The court eliminated the loss of the cattle and permitted the remainder of the answers to stand, and thereby permitted the jurors to believe that the loss of the teacher's society and the injury to the watering place were elements of damage in the case, notwithstanding they are not mentioned in the itemized statement of damages, and their questionable cause for recovery in any event. When we consider the rather meager basis for the support of the verdict for \$250 damages, the prejudice to appellant from this class of testimony seems fixed and certain. *City of Omaha v. Kramer*, 25 Neb. 489; *Jameson v. Kent*, 42 Neb. 412; *Combs v. Agricultural Ditch Co.*, *supra*. Appellees produced testimony to show that by virtue of the loss of power they had been compelled to run a hand separator for some five months from May to September in 1903; that the work could have been done in from one to two hours less

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time each day by the use of the water-power; that a man cost them 12 cents an hour, and thereby the jury might have included some \$27 for this item of damages; that the submerging of their land destroyed certain strawberry plants, pie-plant and currant bushes of the value of \$25; that they were deprived during two winter seasons of the revenue they would have earned from sawing wood and grinding feed. They mention two instances of persons who desired to have feed ground, and one of appellees states that he estimates that they lost the grinding in each season of from 400 to 500 tons of feed, for which they were charging 10 cents a hundred, but there is not a particle of evidence in the record to show what expense appellees would have incurred in grinding this grain for feed, and it is beyond the power of any person to ascertain from the record the net loss accruing to appellees by virtue of their inability to grind grain, or saw wood, either for themselves or the public. The same condition exists relative to the grinding of sickles. The missing facts could have been produced, and the jury advised of every material fact essential for a logical and just deduction of appellees' damages in the loss of the use of their water-power, if any they suffered. It will be kept in mind that the mill was situated distant from town, and did not enjoy a continuous run of trade.

2. We are satisfied from a careful reading of the entire record that the findings of the court and its judgment of injunction should be affirmed. The sole issue presented on this branch of the case is one of fact, and we have reached our conclusion independently of the findings of the jury and those of the trial court. It is not disputed that the mill was constructed and water for its use appropriated prior in time to the construction of appellant's dam. It is also admitted and conceded all around that appellees' grantor surveyed and staked out the location of appellant's dam, head gate and ditches. Appellant states: "I told him (Palmer) I would like to have him run my ditch and set the stake of my head gate, and that I

wanted—that we should figure on 18 inches of water under a 4-inch pressure, and I wanted to get up as high as I could without interfering with the mill; and I told him, if possible, I would like to get it up on the ground down there at the house, and for him to get it just as high as he could without interfering with the mill. And he suggested that I should go above the mill, but I told him that I wanted the water he used in the mill to irrigate with, and for him to put it down there so it wouldn't interfere with the mill.” Now, Palmer was not only the mill-owner, but a surveyor as well, and it seems reasonable to hold that Palmer fixed, as he says he did, the initial point upon the top of the floor of his penstock; that from that point he estimated the levels and the height to which the dam might be constructed so that the backing of the water would not attain a point where it would interfere with the operation of his wheel. Appellant insists that the head gate, and not the floor of the penstock, was the basis from which the parties must work out the agreement, but the head gate is so constructed that the dam may be raised a considerable additional height and still the head gate furnish an outlet into the ditch for the water of the Niobrara. Palmer testifies that he ran the level from the foot of his wheel to the top of the proposed dam. “Q. You took the foot of your wheel or the floor of the race as your starting point, did you not? A. The top of the water; yes. Q. Did you take the top of the water or the floor of the race? A. I took the top of the water as the water would flow out from the wheel. Q. And you didn't start from the floor of the race? A. Yes; that would be the floor of the race, the top of the water when the wheel was open. There was a timber there, and when the wheel was running the water started right at the top of that, and I set the instrument on that timber. Q. Now, how much was his dam below—how much lower was the top of his dam, as you located it? A. I don't know anything about the top of his dam. I know where I gave him the top. Q. How much lower was that level than the floor

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of your race, 15 inches below the wheel? A. It was 18 inches that I gave him from the top of this timber; that is where I started my bench, and run my level from there, and where I showed him the top of the water would be 18 inches below that." Witness says he preserved his field notes, and inspected them shortly before testifying. The fact seems to be that Furman's improvements did not interfere with the water-power from 1894 till some time about 1900, so it would seem that, if Palmer's survey was followed in the construction of the Furman dam, he had provided a margin of safety for the use of the dam so far as the water-wheel was concerned. Palmer, Eugene C. Kendrick and Humphrey Kendrick testify that Furman has raised the dam since its original construction. Eugene C. Kendrick says that the first summer they owned the mill the water stood but 16 inches in Furman's head gate, and in the fall of 1903 it was 33 to 34 inches. Both Eugene and Humphrey Kendrick testify that Furman admitted to them he had raised the dam. One witness says he said he had raised it a foot. Appellant does not deny these statements. Both Furman and his son testify the dam has not been raised higher than it was originally constructed, but that every year the dam would sink down by reason of the decay of material used in its construction, and because of the quicksand in the bottom of the river. There is testimony tending to show that appellant's ditch has filled with silt and sand, and that the ditch has not been cleaned out, so that the water must be raised higher in order to flow into and through the ditch than at the time it was first constructed; and that proper construction of a dam, in position like Furman's, calls for a sluiceway to permit the water to be drawn off in the winter time when not used for irrigation, and to assist in carrying off the silt and sand that accumulate above the dam. On the other hand, there is testimony to show the Furman dam is constructed in the same way as most of the dams built for irrigation purposes, and this we do not doubt, but in none of the other instances was it necessary to guard

against damage to an upper mill-owner, as in the instant case. Various measurements were taken and testified to by as many surveyors, but the trial court did not seem satisfied with their results, so he, with the co-operation of the parties, secured Paige Francis, a civil engineer and under-secretary of the state board of irrigation, to run the levels and report the facts to the court, and Francis testifies that the water below Furman's dam was two and eight-tenths feet lower than the floor of appellees' penstock, and that the crest of the water as it fell over the dam was eight-tenths of a foot lower than said initial point. There is testimony in the record establishing the fact that between the water-wheel and the dam a bridge has been constructed, and that the pilings supporting the superstructure thereof obstruct the free flow of ice floating in the water; that there is a horseshoe bend in the river below the bridge and above the dam; also that canyons empty storm-water and debris into the river above the dam and below the water-wheel, and particularly that a quantity of sand, gravel and other debris was forced down through one canyon and into the river just above the bridge. There is also testimony to the effect that the floor of the tailrace is considerably lower than the surface of the water in the river opposite both the head and exit of the tailrace, and lower than the bed of the river just above the bridge. Appellees, however, contend that, with the Furman dam maintained not to exceed 18 inches below the floor of their penstock, the action of the water from the tailrace would scour a path from the tailrace down stream, and thereby an exit would be furnished for the escape of the water used to operate the water-wheel.

The evidence to us seems to preponderate in favor of appellees on the issues of the license granted appellant by Palmer, the height of the dam and the effect of present conditions upon the operation of appellees' water-wheel, and we find they were entitled to the injunction granted by the trial court.

We therefore recommend that the judgment of the lower

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court awarding appellees damages be reversed and remanded, and that in all other things the judgment of said court be affirmed.

FAWCETT, C., concurs in the conclusion, but not in all of the reasoning.

CALKINS, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the lower court awarding appellees damages is reversed and remanded, and in all other things the judgment of said court is affirmed.

JUDGMENT ACCORDINGLY.

JENKINS LAND AND LIVE STOCK COMPANY, APPELLEE, v.
GARWOOD H. ATTWOOD, APPELLANT.

FILED FEBRUARY 20, 1908. No. 15,071.

1. **Mortgage Foreclosure: REQUEST FOR STAY.** Where a request in writing for stay of order of sale is on file with the clerk of the court within 20 days of the rendition of a decree foreclosing a mortgage, the court is without power to sell the mortgaged premises within nine months of the entry of the decree.
2. ———: ———. A request filed as aforesaid before the entry of the decree is effective to act as a stay equally as though it had been filed within 20 days thereafter, and constitutes a continuing request for such stay.
3. ———: ———. The owner of the equity of redemption, notwithstanding he has sold and conveyed his interest in the mortgaged premises subsequently to his appearance as defendant in the action, may continue to act for the benefit of his grantee, and file a request for a stay.
4. Confirmation will not validate a void sale.
5. Evidence examined, and held not to sustain the appellant's defense of title by adverse possession.

APPEAL from the district court for Dundy county:
ROBERT C. ORR, JUDGE. *Affirmed.*

Charles W. Meeker, David G. Hines, Mockett & Mattley
and *J. C. McNerney*, for appellant.

W. S. Morlan and Charles T. Jenkins, contra.

ROOR, C.

This was an action to cancel a sheriff's deed, whereby appellant claims title to 474 acres of land in Dundy county. The facts, as we glean them from the evidence, and the admissions in the pleadings, are: That one Warner in 1889, being the owner of the fee of said lands, executed a mortgage thereon to secure the payment of his promissory note. Soon thereafter Warner sold and conveyed his equity to the Nebraska Real Estate and Live Stock Association. Appellant became the owner of the note and mortgage, and on the 30th day of September, 1892, commenced his action to foreclose the mortgage, making Warner and wife, Warner's grantee, and other persons, defendants. December 20, 1892, The Nebraska Real Estate and Live Stock Association and Alonzo L. Clark, trustee, filed their joint answer in said action, admitting all the facts alleged in the petition, and stating that the defendant corporation was the owner of the equity of redemption of all of said real estate, "and request that whatever decree may be rendered here it may be stayed for a period of nine months from the rendition of said decree." March 14, 1893, said corporation filed a simple request for a stay of execution and order of sale in said case. April 19, 1894, a decree of foreclosure was rendered. March 31, 1893, the Nebraska Real Estate and Live Stock Association sold its interest in said real estate to Alma E. Jewett. May 28, 1894, the clerk of the court issued an order of sale on said decree, and July 9, 1894, appellant purchased the real estate at sheriff's sale for the amount of his mortgage plus accrued interest.

July 14, 1894, the sheriff made return to his order of sale. March 19, 1896, an entry was made on the journal of the district court in said case that "this case came on on the motion of plaintiff to dismiss said action. On due consideration whereof the court doth sustain said motion, and it is ordered that said action be, and hereby is, dismissed at plaintiff's costs." The journal entry does not recite the appearance of any party to the suit, nor that of any attorneys for plaintiff or defendants. The court's trial calendar discloses the name of an attorney for appellant, but it is not claimed he requested the entry of the dismissal. March 27, 1900, appellant by his attorney moved the court "to reinstate the above entitled cause of action and place the same on the trial docket, for the reason that it was dismissed by mistake, after decree and sale had been obtained." That same day, without notice to, or the presence of, any party adversely interested, the court found that the action had been dismissed upon the motion of certain attorneys claiming to represent appellant; that said attorneys were without authority in the premises, and that said case was wrongfully dismissed; and "it is therefore considered by the court that said case be reinstated and redocketed." Immediately thereafter the court affirmed the sale and ordered the then sheriff to execute a deed to appellant, which was done. The sheriff's deed was recorded April 9, 1900. January 28, 1905, appellee purchased from Mrs. Jewett the real estate. Appellant claims title by virtue of his sheriff's deed, and also by adverse possession. The district court canceled the sheriff's deed, the order of sale, and confirmation of said sale, and held that the decree of foreclosure was valid and unsatisfied. If the court had power through the sheriff to make the sale, or if appellant has secured title by adverse possession to the land in question, he should prevail.

Had the court power to sell the land within nine months of the decree, a request for the stay being on file within 20 days of the entry of the decree? It is our opinion that

it did not. Section 477b of the code provides: "The order of sale on all decrees for the sale of mortgaged premises shall be stayed for the period of nine months from and after the rendition of said decree, whenever the defendant shall within twenty days after the rendition of the decree, file with the clerk of the court a written request for the same: Provided, that if the defendant make no such request within said twenty days, the order of sale may issue immediately after the expiration thereof." We are aware that some courts, notably Illinois, consider the sale of property on execution issued on a judgment that has been stayed a mere irregularity, to be cured by confirmation; but the trend of judicial thought in Nebraska has been to uphold and make effective the evident legislative will to furnish the debtor absolute immunity from the sale of his property when he has complied with the statutes relating to a stay of execution or order of sale. Says Chief Justice MAXWELL, in *State Bank v. Green*, 8 Neb. 297: "Upon the bond being filed and approved, the power of the court below to proceed in the case is suspended until the bond is set aside, modified, or the appellant fails to perfect his appeal within the time required by the statute." Construing the cited decision, Mr. Justice LAKE, in *State Bank v. Green*, 10 Neb. 130, says: "The effect of that decision was to declare invalid the execution and all that was done under it." We recognized the principle and adhered thereto in *Kountze v. Erck*, 45 Neb. 288, and it may now be said to be a long and well-established rule in Nebraska that, pending the stay of a judgment, the power of the court to execute that judgment is suspended. It is true that the stay in the cases cited followed the giving and approval of supersedeas bonds, and in the instant case a technical supersedeas in the sense that the judgment was vacated did not occur, but a stay of the judgment came about as a consequence of the request. We consider that the principle applies in either case. *August v. Gilmer*, 53 W. Va. 65; *O'Donnell v. Mullin*, 27 Pa. St. 199, 67 Am. Dec. 458;

Hopkins v. Scars, 14 Vt. 494, 39 Am. Dec. 236. To hold otherwise would permit the mortgagee to induce the sheriff to sell the land included in a foreclosure decree and secure a confirmation and deed without the knowledge of the holder of the equity of redemption. The sheriff is not required to levy upon the land, nor the appraisers to make entry thereon, so that a sale and confirmation might easily be brought about while the mortgagor was depending on his request for a stay.

2. The court being without power to sell the land at the time it was sold, it is immaterial whether the sale was confirmed or not, or whether or not the plaintiff actually dismissed his case, or whether the order vacating that dismissal and reinstating the case was properly made. The trial court held the decree of foreclosure was still effective. No appeal was taken from that part of the decree, and the legality and effect thereof cannot be questioned by appellee or any one holding under it. The confirmation could not cure a void sale. "The sale being void, there was no subject-matter upon which the order of confirmation could act. If the court had no jurisdiction to order the sale, it had none to confirm it. Where there is no power to render a judgment, or to make an order, there can be none to confirm or execute it." *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609; *Townsend v. Tallant*, 33 Cal. 45, 91 Am. Dec. 617.

3. Appellant argues that the request for a stay was not filed after, but before, the entry of the decree; that one to receive the benefits of the statute must adhere strictly thereto, and that filing a request before is not equivalent to filing one after the entry of the decree, and cites *State v. Laflin*, 40 Neb. 441, and *Hoyt v. Little*, 55 Neb. 71. The effect of these decisions is that, as the statute plainly limits 20 days subsequent to the decree as the time within which the stay may be filed, a stay filed thereafter is inoperative, and that it is not within the power of the courts to enlarge that time. In the instant case the request was filed, not only before the twentieth day from the rendition

of the decree, but before the decree was rendered, and in our opinion the request was a continuing solicitation effective the day the decree of foreclosure was rendered.

4. Appellant says that, as the Nebraska Real Estate and Live Stock Association subsequently to the time it filed request for a stay, and before the entry of the decree, sold and conveyed its interest in the property, the stay was not filed by a defendant so situated as to be entitled to ask therefor. The trial court evidently was not advised that there had been any transfer of title from the defendant corporation to Mrs. Jewett, and the suit continued, as it properly could, against the defendants who represented in that suit, not only themselves, but the interests of their grantees. Code, sec. 45. Under the facts, we are satisfied the stay was effective to protect the rights of Mrs. Jewett.

5. It is claimed appellant has acquired title by ten years' adverse possession. We have read the record over carefully, and are satisfied the evidence does not sustain this contention. Part of the land has been used for meadow, a part thereof for pasture, and a small tract has been cultivated on occasions, but not during ten succeeding years. In August, 1893, appellant leased the land to Norman J. Allen, who also leased it for the years 1894, 1895 and 1896. Fences were constructed on the land, but it does not seem to have been inclosed. During part of the time it was included in a larger tract, and cattle, not controlled by appellant or his tenant, grazed upon the pasture land. The witness Larned leased the land to various parties for appellant in 1897, and he says continuously since. He says the land was inclosed, but on cross-examination he was not certain as to the location of the fences, and finally admitted the land formed part of a larger and inclosed tract. Larned leased the land in August, 1905, from appellee. He says the leasing was the result of compromise, but the instrument evidencing his arrangement is a plain lease. Appellant resides in Connecticut, and has never been upon the land. The testimony does not establish that connected, continuous and adverse possession

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for ten years essential to vest appellant with title to the land; *Hoffine v. Ewings*, 60 Neb. 729.

We are satisfied that the judgment of the lower court was right and should be affirmed.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the lower court is

AFFIRMED.

CHARLES M. CHAMBERLAIN V. STATE OF NEBRASKA.

FILED MARCH 5, 1908. No. 14,755.

1. **Criminal Law: INSTRUCTIONS.** Instructions must be predicated on the evidence; and in the prosecution of a bank officer for embezzlement it is error to submit to the jury the fact of his having overdrawn an account with the bank as proof of guilt, unless the evidence is sufficient to establish every element necessary to make the transaction criminal in its nature.
2. ———: ———: **BURDEN OF PROOF.** In a criminal prosecution the burden is upon the state to establish every element of the crime charged beyond a reasonable doubt; and an instruction which shifts the burden of proof to the defendant, and informs the jury that the evidence must show beyond a reasonable doubt that the defendant in doing the act complained of acted in good faith, and was not actuated by improper motives, is erroneous.
3. ———: **EVIDENCE.** Under an indictment charging a bank officer with embezzling its funds on a certain date, evidence tending to show embezzlement of different amounts at different times before that date, and the manner in which he conducted the business of the bank, is admissible for the purpose of assisting the jury in determining the defendant's guilt or innocence of the charge set forth in the indictment.
4. **Embezzlement: INDICTMENT.** An indictment for embezzlement is sufficient if it sets forth the crime in language equivalent to that contained in the statute creating and defining that crime, without averring the particular acts in which the offense consists.

ERROR to the district court for Nemaha county: JOHN B. RAPEB, JUDGE. *Reversed.*

Halleck F. Rose, W. B. Comstock and Neal & Quackenbush, for plaintiff in error.

W. T. Thompson, Attorney General, George A. Adams and Jay C. Moore, contra.

BARNES, C. J.

At the February, 1903, term of the district court for Johnson county a grand jury returned 18 indictments against Charles M. Chamberlain, who was the defendant in the court below, each of which charged him with a specific act of embezzlement of funds of the Chamberlain Banking House of Tecumseh, in that county. On a change of venue he was tried in the district court for Nemaha county on one of the indictments, which reads as follows: "That Charles M. Chamberlain, late of the county aforesaid, on the 25th day of August, in the year of our Lord 1902, in the county of Johnson, and state of Nebraska, aforesaid, then and there being, and then and there being the cashier of the Chamberlain Banking House, a corporation then and there engaged in banking, did then and there embezzle, abstract and wilfully misapply of the moneys and funds of the said Chamberlain Banking House, to wit, the sum of \$10,000 in money, with intent then and there to injure and defraud said Chamberlain Banking House out of said money, and each and every part thereof, he, the said Charles M. Chamberlain, then and there having received and obtained the said money as such cashier of the said Chamberlain Banking House, and having then and there said money in his possession, control and management as such cashier of said banking house." On motion of the defendant, and by order of the trial court, the words "abstract and wilfully misapply" were eliminated from the indictment, and so the single specific charge on which defendant was placed on trial was the embezzle-

ment of \$10,000 on the 25th day of August, 1902. The trial resulted in his conviction. He was sentenced to hard labor in the state penitentiary for the period of five years, and has prosecuted error to this court.

1. To establish the charge contained in the indictment, the state, over defendant's objection, introduced evidence of a certain transaction, in substance, as follows: On April 5, 1895, the defendant and his brother Clarence executed a demand note for \$2,000 payable to Louis Stull, cashier, which came into the possession of the Industrial Savings Bank. Suit was brought on the note in the district court for Lancaster county, and a judgment was obtained thereon against the makers. In payment of that judgment the firm of Chamberlain Brothers, of which the defendant was a member, and which at that time had a deposit account with the Chamberlain Banking House, drew its check on that institution for \$2,500, which was presented to, and paid by, the bank on the 29th day of March, 1902. The payment of the check caused an overdraft of the account of Chamberlain Brothers amounting to \$1,765.15. The item was charged to the deposit account of the drawers of the check, and not to any of the general accounts of the bank. We find no proof in the record tending to show that the check causing the overdraft was paid without the assent of the directors of the bank, or a majority of them. No proof was offered by the state to show the pecuniary irresponsibility of the firm of Chamberlain Brothers, or its members, at the time the check was cashed, or prior or subsequent thereto. The check, which was drawn by defendant, was charged to the account of the makers of the note, which it paid, and it was left openly on file in the bank to evidence the debt which its payment created. Payment by a bank upon a check of a sum in excess of the credit balance of an ordinary depositor in the usual course of business, if done with the assent of a majority of directors, is a loan to the depositor of the amount of the overdraft created by the payment. Zane, Banks and Banking (1st ed.), sec. 160; *Potter v.*

United States, 155 U. S. 438; 5 Cyc. 583. The banking act of this state does not make such a transaction unlawful, even where the loan is made to an officer of the bank, except it be done without obtaining the approval of a majority of the directors. Comp. St. 1907, ch. 8, sec. 26. By this statute a substantive element of the offense described therein is that the funds must have been borrowed by the officer without having first obtained the approval of a majority of the directors of the bank. So, in order to make the transaction above described criminal in its nature, it was necessary for the state to allege and prove that the overdraft in question was made without the consent of a majority of the directors of the bank, or with the intention of cheating and defrauding that institution. Notwithstanding this fact, the court gave the ninth instruction requested by the prosecutor predicated on the transaction above described, and which is now assigned as error, by which the jury were told, in substance, that, if the check in question was drawn for, or in payment of, an individual debt or obligation of the defendant, or of Chamberlain Brothers, or of C. M. and C. K. Chamberlain, that the banking house, upon the authority of the defendant, or by his direction, cashed or paid the check out of its own money and charged the same to the account of Chamberlain Brothers, and by so doing overdrew that account with the bank in the sum of \$1,765.15, and that such payment was made under such circumstances as were liable to imperil the interests of the bank and cause it to lose the amount of the overdraft, then the payment of the check by him, or at his direction as cashier, if done with intent to injure or defraud the bank, would be embezzlement. It may be conceded that this instruction, if based upon sufficient evidence, is a correct statement of the law; but it must be remembered that the state produced no evidence showing or tending to show that the payment of the check was made under circumstances liable to imperil the interests of the bank, or cause the loss of the amount of the overdraft, or that it was done with intent to injure and

defraud that institution. It is a well-established rule that instructions must be predicated upon the evidence; and in a criminal prosecution an instruction which submits to the jury the question of the defendant's guilt or innocence of a criminal offense, where the state has produced no evidence tending to prove an element necessary to be shown to make the particular transaction in question criminal in its nature, is prejudicial, and calls for a reversal of a judgment of conviction. As above stated, we find no evidence in the record relating to the matter of the overdraft in question which shows, or tends to show, that at the time the defendant drew the check which created the overdraft it was his intention to cheat and defraud the bank, or that Chamberlain Brothers were insolvent. It is but fair to say that at the time when the bank closed its doors the greater part of the overdraft was unpaid; yet this alone is not sufficient to establish the fact, beyond a reasonable doubt, that the defendant when he drew the check intended to cheat and defraud the bank, for he, or the firm of Chamberlain Brothers, may have fully intended to repay the amount of the overdraft and have had the ability to do so. Indeed, in the absence of evidence direct or circumstantial to the contrary, the presumption is that his intention was that the overdraft would be paid either by himself or the firm. It follows that for the giving of this instruction the judgment of the district court should be reversed.

2. It is strenuously urged that the district court erred in giving the fourth instruction requested by the state. In this connection it is necessary to state the facts on which this instruction was predicated. The evidence discloses that on the 13th day of August, 1902, the bank teller credited the individual deposit account of the defendant with an item of \$4,600 salary; that the teller made a computation to determine the accuracy of the credit; that in so doing he took the general ledger of the bank and ran back through the expense account until he found the date upon which the defendant had received his last credit for

salary. He testified that he knew the amount per month to which the defendant was entitled, and that the defendant had not drawn any salary for 46 months prior to that date. The evidence of the teller on this point was corroborated by several other witnesses for the state. In fact there seems to be no dispute about this matter. It also appears that after the entry of the credit, and before the date of the alleged embezzlement, the defendant checked out the deposit in question for various purposes. It was the contention of the state that this transaction constituted embezzlement, because the defendant had so managed the affairs of the bank that he was largely indebted to that institution at the time the credit was given, and that he obtained the credit and withdrew the funds for the purpose of injuring and defrauding the bank.

The first clause of the instruction reads in part as follows: "If you find from the evidence, beyond a reasonable doubt, that the defendant while he was cashier of the said Chamberlain Banking House kept an individual account of his own, and in his own name, in said banking house, and that on or about the 13th day of August, 1902, he credited his said individual account with an item of \$4,600 as salary for 46 months, and that at said time he in good faith believed he had a right to so credit his said account with said amount, or that he in good faith believed said bank was owing him said amount, then you are instructed that the placing of such credit to his individual account, and afterwards drawing the money out on his checks or otherwise, would not be embezzlement of such money." By the second clause of the instruction the jury were told, in substance, that, if they should find from the evidence, beyond a reasonable doubt, that the defendant at said time was owing said banking house as much as or more than \$4,600, and that he knew the said banking house was not owing him said amount, or any part thereof, or if he was largely indebted to said banking house for money he had taken from the same and wrongfully appropriated to his

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own use, or to the use of himself and others, and that he placed said amount to his credit, or caused it to be placed there in order that he might thereafter draw that sum from the bank under an apparent right to do so, but with the intent to convert it to his own use, and that the placing of the credit to his own account was intended by him as a scheme to cover or better enable him to wrongfully convert the same to his own use, and that he did thereafter wrongfully draw said money or any part thereof from the bank and convert it to his own use, with intent to injure and defraud the bank, then he was guilty of embezzling the same. It seems clear that by the first clause of the instruction the court directly and unequivocally stated to the jury that before the defendant could escape responsibility for embezzlement of the item in question the proof must be such as would satisfy them, beyond a reasonable doubt, that the defendant in good faith believed he had a right to so credit his account, or that in good faith he believed that the bank was owing him said amount. It seems plain that this not only denied the accused the benefit of reasonable doubt, and precluded the jury from considering whether the credit was made for a debt in fact owing by the bank, but it also limited the defendant's right to escape criminal punishment by the narrow issue as to whether he believed, though erroneously, there was a legal liability for the debt upon the part of the bank, and on this issue the court imposed upon him the burden of proof to show that he entertained such belief beyond a reasonable doubt. That it was error for the court at any stage of the proceedings to impose upon the defendant the burden of proof to establish his innocence of the crime charged, or any particular element of it, there can be no question. It is contended by the state, however, that the error, if any, in the first clause of the instruction is cured by the second portion of it, the substance of which is above stated; and it is insisted that the whole paragraph should be read and construed together, and when thus considered it is a correct statement of the law. We cannot give it

such a construction. It clearly informed the jury that if they should find, beyond a reasonable doubt, that at the time the credit in question was made the defendant in good faith believed that he had a right to it, that the bank was owing him that amount, then the placing of the item to his individual credit, and afterwards drawing the money out on his checks or otherwise, would not be embezzlement, when they should have been told that if they entertained a reasonable doubt as to whether the money represented by the item of \$4,600 salary was actually owing by the bank to the defendant, or that the defendant honestly believed it to be due, and caused the credit to be entered to his personal account in that belief, then the transaction in question should not be considered by them in determining the guilt or innocence of the defendant of the crime charged against him. So we are of the opinion that the giving of this instruction requires a reversal of the judgment of the trial court.

3. The record of the trial discloses that the state, over the defendant's objections, was allowed to introduce evidence of his manner of conducting the business of the bank, and of many of his transactions with that institution occurring at different times, many of them long prior to the time when the offense for which he was on trial is alleged to have been committed; and it is contended that this was reversible error. This contention cannot be sustained, for it has often been held, on principle and precedent, that the state in such cases may introduce evidence of separate and distinct acts or transactions, which may be embezzlement in themselves, tending to prove the substantive offense charged. *State v. Reinhart*, 26 Or. 466; *Brown v. State*, 18 Ohio St. 496; 1 Bishop, New Criminal Procedure, sec. 397; *State v. Dale*, 8 Or. 229; *Jackson v. State*, 76 Ga. 551; *State v. Pratt*, 98 Mo. 482, 11 S. W. 977; *Campbell v. State*, 35 Ohio St. 70. In *Ker v. People*, 110 Ill. 627, 646, it is said: "The body of the crime consists of many acts done by virtue of the confidential relations existing between the employer and

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the employee, with funds, moneys or securities over which the servant is given care or custody, in whole or in part, by virtue of his employment. The separate acts may not be susceptible of direct proof, but the aggregate result is, and that is embezzlement." This doctrine is not only supported by reason and authority, but is proper and just. The rule contended for by the defendant in this case would render it exceedingly difficult, if not impossible, in many cases to secure a conviction of a confidential agent or servant of a firm or corporation or a bank officer intrusted with the custody and control of its funds. The trust and confidence reposed in such employee or officer affords him the amplest opportunity to misappropriate the funds intrusted to his care, and makes it almost, if not quite, impossible to prove just when and how it was done. But the ultimate fact of embezzlement is susceptible of proof, and that is the act against which the statute is directed. The crime, as in the case at bar, may consist of many acts done in a series of years, and the fact at last be discovered that the bank's funds have been embezzled, and yet it may be impossible for the prosecution to prove the exact time and manner of each or any separate act of conversion. In such a case, if the state should be compelled to rely for conviction upon a single act, the accused, although he might be guilty of embezzling large sums of money in the aggregate, would probably escape conviction. The law should not afford exemption from just and merited punishment on mere technical grounds which do not in any way affect the guilt or innocence of the defendant or the merits of the case.

It appears, however, that in the prosecution of this case the state treated the separate and distinct acts introduced in evidence as substantive crimes; and it is contended that the court erred in instructing the jury, in substance, that if they should find that the defendant committed such acts, beyond a reasonable doubt, they should then find him guilty of the crime charged in the

indictment on which he was being tried. We think there is much force in this criticism. Where the state is permitted to introduce evidence of separate and distinct transactions not set forth or described in the indictment, each of which in itself may amount to a criminal offense, the court should instruct the jury that evidence of such transactions is received and should only be considered by them for the purpose of assisting them in determining the defendant's guilt or innocence of the particular crime charged in the indictment. We find from an examination of the record that the state was allowed in this case to introduce in evidence a great many of the defendant's transactions with the bank occurring at different times, some of them being prior to the 25th day of August, 1902, similar to those above described, and the record contains numerous assignments of error therefor. To discuss and determine all of them would extend our opinion to an unreasonable length, and serve no useful purpose. What we have already said disposes of all similar questions, and such assignments will receive no further consideration. Again, it appears that the case was treated by the prosecuting attorney as though the defendant was an officer on trial for embezzling public money, instead of an agent or cashier of a bank charged with the embezzlement of private funds, and it is proper to observe that much more must be shown in a case like the one at bar, in order to procure a conviction, than is necessary to be proved to sustain a charge of embezzlement of public funds.

4. Finally, it appears that the defendant has, at all times, challenged the sufficiency of the indictment, and now contends that it is insufficient in form and substance to charge him with the crime of embezzlement. It is not only proper but necessary for us to determine this question before concluding our opinion. The principal criticism of the indictment is that it does not contain an averment that the money in question was converted by the defendant to his own use, "without the assent of the

bank," and it is claimed that the omission of that allegation renders the indictment fatally defective. We find, however, that the charge follows the language of section 135 of the criminal code, under which the indictment was drawn. The rule is that it is generally sufficient, in charging a statutory crime, to follow the language of the statutes defining it, and we are not convinced that the present instance is within any of the exceptions to that rule. The word "embezzle" is defined by section 121 of the criminal code, and wherever that word appears in the subsequent sections of the act it should be construed to mean and include the elements of that definition. In *Bartley v. State*, 53 Neb. 310, it is said: "An information for embezzlement is sufficient if it sets forth the crime in the language of the statute creating it, without averring the particular acts in which the offense consisted." In *Mills v. State*, 53 Neb. 263, and in *Jackson v. State*, *supra*, it was held that the word "embezzle" includes within its import the conversion to his own use of the money alleged to have been embezzled by the accused. Again, it is alleged in the indictment in this case that the defendant did embezzle of the funds of the said Chamberlain Banking House the sum of \$10,000 in money, with intent to injure and defraud said Chamberlain Banking House out of said money, and each and every part thereof; and it would seem that the words "with intent then and there to injure and defraud" are broad enough and amply sufficient to include the charge that the act was done without the consent of the bank. Indeed, they may be said to be the equivalent of such an allegation. So we are of opinion that the indictment is sufficient to charge the defendant with the crime of embezzlement.

As above stated, the record contains many other assignments of error. Some of them, without doubt, are substantial in their nature. But what we have already said is sufficient to prevent a recurrence of similar errors in case of another trial. For the errors above men-

tioned, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

STATE OF NEBRASKA V. PACIFIC EXPRESS COMPANY.

FILED MARCH 5, 1908. No. 15,307.

1. **Statutes: EMERGENCY CLAUSE.** An act which merely provides "this act shall take effect on and after its passage and approval" does not "express an emergency," under the requirements of section 24, art. III. of the constitution, and does not take effect until three months after the adjournment of the legislative session.
2. **Carriers: STATE CONTROL.** Express companies operating over the lines of railroad corporations exercising a public franchise in this state are equally subject to state control and regulation with the railroad companies over whose lines they operate, within the limited field of the business of transportation which they occupy.
3. ———: **UNLAWFUL RATES: INJUNCTION.** The attorney general may, on behalf of the state, maintain an action in equity to enjoin common carriers whose rates are fixed by law from violating the terms of the statute and exacting unlawful and excessive rates and charges.
4. **Supreme Court: JURISDICTION: ACTION BY STATE.** The jurisdiction conferred upon this court by the constitution "in all civil cases in which the state shall be a party" is not confined to cases in which the state has a mere pecuniary interest, but may extend to all cases in which the state, through its proper officers, seeks the enforcement of public right or the restraint of public wrong.
5. ———: ———: **PUBLIC WRONGS: INJUNCTION.** A wrong of a nature which affects the rights and interests of people living in almost every city, town and village in the state, as well as persons living in the country, when committed by a public service corporation, is a public wrong. An action to restrain such a wrong by the state is within the jurisdiction of this court.
6. **Carriers: RATES.** Until otherwise prescribed by competent authority, by the provisions of sections 2, 3, ch. 92, laws 1907, express companies doing business in this state after the law took effect may charge for the transportation of merchandise within

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this state any sum not exceeding 75 per cent. of the rate in force on the 1st day of January, 1907, and 30 days were allowed after the act was in force for such companies to file with the state railway commission the schedule of rates and classifications in force on that date.

ORIGINAL action by the state to enjoin defendant from putting into effect charges or rates other than those established by law. Defendant filed plea in abatement. *Overruled.*

W. T. Thompson, Attorney General, Grant G. Martin and Halleck F. Rose, for the state.

Charles J. Greene and Ralph W. Breckenridge, contra.

LETTON, J.

On July 5, 1907, the attorney general filed in the name of the state of Nebraska petitions against the Adams Express Company, and four other express companies doing business in this state, alleging in substance: That the defendants are common carriers engaged in carrying on an express business over various lines of railroad in the state of Nebraska; that the legislature of 1907 passed the following act (laws 1907, ch. 91), known as "Senate File No. 355":

"An Act to provide for the filing of schedules of rates charged by express companies for the transportation of money or merchandise within the state of Nebraska; to fix a maximum charge for such service; to provide for the enforcement of the provisions of this act; and for penalties for failure to comply with its provisions.

"Be it Enacted by the Legislature of the State of Nebraska:

"Section 1. (Express company Defined.) All persons, associations or corporations engaged in the transportation of money or merchandise for a money consideration in cars other than freight cars and on trains other than

freight trains shall be deemed an express company within the meaning of this act.

"Section 2. (Schedule of Rates.) Within thirty days after the passage and approval of this act, all express companies doing business in this state shall file with the railway commission a complete schedule of the rates and classifications charged for the transportation of money or merchandise within this state by such company, which was in force on the first day of January, A. D. 1907.

"Section 3. (Rates.) Express companies may charge and receive for the transportation of merchandise within the state of Nebraska any sum not exceeding seventy-five per cent. of the rate as shown in the schedule provided for in section 2 of this act until after the state railway commission shall have provided a greater rate.

"Section 4. (Same, Minimum.) Provided that nothing in this act shall be construed to change the prepaid rates on merchandise weighing one (1) pound or less; and provided, further, that no provision of this act shall reduce any special contract rate in force for the transportation of cream, milk or poultry or any charge to a sum less than fifteen cents; and provided, further, that nothing in this act shall abridge the authority of the railroad commission to make a reduction in any rate provided for in this act.

"Section 5. (Violation of act.) If any express company should fail to comply with the provision and conditions of this act, they shall be fined on conviction a sum not less than ten dollars or more than one thousand for each offense.

"Section 6. (Enforcement of Act.) The Nebraska state railway commission, and if there be no commission, then the governor with the assistance of the attorney general, are hereby empowered to enforce the provisions of this act.

"Section 7. (Emergency.) This act shall take effect on and after its passage and approval.

"Approved April 5, 1907."

That it is the duty of the defendant to obey the statute and put in force the rates fixed by the legislature in said act, but that the defendant has put in force unlawful charges and rates for intrastate transportation of merchandise within the state of Nebraska, and is exacting from the people of the state of Nebraska unlawful, exorbitant and unconscionable rates and charges; that individual citizens who are interested are unable to cope with the defendant, and that it is the duty of the state to protect the people from the unlawful, exorbitant rates and charges exacted by the defendant. The prayer is for an injunction to prevent the defendant from making or putting into effect any other or different charges from those prescribed in the act, or from interfering with or attempting to change the rates and charges established by law for its services.

An answer was filed, which contained, among other things, an allegation that the law was not effective on July 5, 1907, on account of not having been passed with an emergency clause. The attorney general filed a motion to strike this part of the answer, on the ground that, under the provisions of section 7 of the act, which provides: "This act shall take effect on and after its passage and approval"—the act took effect as soon as passed and approved by the governor upon April 5, 1907. The motion to strike was overruled, the court being of the opinion that the act failed to comply with that part of section 24, art. III of the constitution, which provides: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct"—and that the act, therefore, did not take effect until three calendar months after the adjournment of the session. By consent this answer of the defendant company has been withdrawn, and an answer in the nature of a plea in abatement has been filed, in order to present

certain preliminary questions which, if the contention of the defendant is upheld, would abate the action. In substance it is pleaded that the state of Nebraska has no power or authority under the constitution and laws of the state to maintain the action; that the supreme court has no jurisdiction; that the petition does not show whether the defendant is a person, association, or corporation; that the rates charged at the time the suits were begun were those in force prior to the 1st day of January, 1907, and that the rates provided for in the act were not in force and effect at the commencement of the present suit, and that the defendant was under no duty under the terms of the act to charge the rates therein provided for.

1. For convenience, we will consider the first and second points together. The defendant asserts that the state of Nebraska has no power or authority under the constitution and laws of this state to maintain the suit, and that this court has no jurisdiction; while the attorney general maintains that the state may maintain a suit in equity in this court to protect the general welfare by protecting the public from oppressions, extortions and other injuries, though the state of Nebraska has no pecuniary or property interests in the suit. Section 22, art. VI of the constitution, provides: "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought"—and section 2, art. VI, relating to the supreme court, provides: "It shall have original jurisdiction in cases relating to the revenue, civil cases in which the state shall be a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law." Referring to that clause of section 22, *supra*, which provides that "the legislature shall provide by law in what manner and in what courts suits shall be brought," it was held in *State v. Moores*, 56 Neb. 1, and, also, in *In re Petition of Attorney General*, 40 Neb. 402, that, even though the provisions of section 2 may not be self-executing, still that they have already been sufficiently

supplemented by legislation, so that the legislature has actually provided by law in what manner suits by the state should be brought, as required by section 22, art. VI.

But it is contended that the state is not properly a party in this case, and it is argued that no suit can be instituted by the state in the exercise of its constitutional powers or "sovereign capacity," except such suit is expressly provided for by statute; that the act in question has by its terms imposed upon the executive department the duty of its enforcement, and that it is therefore beyond the power of the attorney general to shift the burden of executing the law from the executive to the judicial department; that section 6 of the act provides: "The Nebraska state railway commission, and if there be no commission, then the governor with the assistance of the attorney general, are hereby empowered to enforce the provisions of this act"—and therefore that the railway commission is the only body vested with authority to enforce the provisions of the act. It is to be noticed, however, that no powers are conferred upon the railway commission by the statute with respect to the enforcement of the law other or greater than those given to private individuals. There is no procedure specified by which that body may act directly on the offending carrier. The railway commission, if it seeks to enforce the law, must travel the same road as any private citizen—appeal to the courts for relief, or for the punishment of the carrier who violates the law.

The main question presented by defendant's argument is whether the state of Nebraska, in behalf of its citizens concerned with the transportation of merchandise, may apply to this court in an original suit in which it has no pecuniary interest for relief from unjust exactions and extortionate charges made by express companies engaged as common carriers within the state. It is alleged in the petition that the defendant is carrying on its business over various lines of railroad in the state of Nebraska for hire,

and is continually transporting money and merchandise for a money consideration in cars other than freight cars and on trains other than freight trains between stations and between towns and places in the state of Nebraska. The defendant, then, is a public service corporation engaged in transacting business for the public over the public highways of the state of Nebraska. The railroad companies over whose lines of railroad its business is transacted have had conferred upon them a certain portion of the sovereignty of the state of Nebraska—the right of eminent domain—so that they might exercise it for public purposes. Such railway companies may carry on in their own corporate capacity the carriage of goods and chattels, money, merchandise, or any other articles which are susceptible of carriage by railroad transportation, or they may permit subordinate agencies, either personal or corporate, to engage in the transportation of money or merchandise over their lines under special care and in a more expeditious manner than if carried upon ordinary freight trains. The rights, the liabilities and the duties of the defendant, therefore, as a common carrier are measured by the rights, liabilities and duties of the railroad company over whose lines it operates and within the boundaries of the limited field of transportation within which the express company carries on its energies. The express company cannot be held liable for any violation of the duties of the original carrier in a department or sphere with which it is not concerned in the conduct of its business; but, within the limited scope of the field of transportation which is now occupied exclusively by express companies, their relation to the public as common carriers is the same as that of the railroad company. The fountain cannot rise higher than its source, and the express company and the railroad company are both subject to state control and reasonable regulation. The right of regulation by the state of the business of common carriers, especially of those to whom has been granted the right of eminent domain, is beyond discussion. The doctrine has now become so well estab-

lished as to become one of the fundamentals of the law. *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287; *Atlantic C. L. R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1. The grant of the right of eminent domain implies the consideration that the tolls, rates and charges to be made to the public for the use of the railroad shall be just and reasonable, and not extortionate, and that no unjust discrimination shall be made. The power and authority which granted the franchise to the railroad company to become a corporation, and to exercise the right of eminent domain and take private property for public use, even against the will of the owner, is the same power which is exercised to promote the public safety by requiring the lines to be fenced, road crossings to be made, and cattle guards constructed, which regulates the transportation of live stock, and prohibits the exaction of unreasonable and exorbitant charges for the carrying of passengers and freight. In granting the franchises the state did not surrender or abdicate its sovereignty, nor set in operation a power or agency which it thereby lost the right to control. This idea was firmly planted in our constitution at its birth, and the courts have consistently preserved its benefits to the people of this state. *State v. Republican V. R. Co.*, 18 Neb. 512; *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549; *State v. Missouri P. R. Co.*, 81 Neb. 15.

The defendant says: "It is only permissible to the state. in any jurisdiction, even in the absence of constitutional or legislative authority, to litigate in its sovereign capacity cases involving the jeopardy of the public health or the public peace. No well considered case can be found holding the contrary." Elsewhere in the brief of counsel it concedes that the state may maintain actions in which it has a pecuniary interest. But we think the state has not thus abrogated its powers, or denied itself one of the most powerful agencies for the ascertainment of fact and the application of a remedy, if needed, in matters that affect the regulation and control of public fran-

chises. A sufficient answer to this contention is found in the following quotation from the opinion of Justice Brewer in *In re Debs*, 158 U. S. 564, 39 L. ed. 1092: "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court." In *Stockton v. Central R. Co.*, 50 N. J. Eq. 52, it is said: "The next inquiry is, whether the attorney general may invoke the power of this court to restrain further operations under, and in pursuance of, the lease. It is well settled that, where a corporate excess of power tends to the public injury or to defeat public policy, it may be restrained in equity at his suit. In *Attorney General v. Delaware & B. B. R. Co.*, 12 C. E. Green (N. J.), 631, in pronouncing the opinion of the court of errors and appeals, Mr. Justice Dixon said: "In equity, as in the law court, the attorney general has the right, in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit, by what may be called civil information, for their protection. The state is not left without redress in its own courts because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer, on whom it has cast the responsibility and to whom, therefore, it has given the right of appearing in its behalf and invoking the judgment of the courts on such questions of public moment." Professor Pomeroy, in his work on Equity Jurisprudence (3d ed.), sec. 1093, states the rule in this language: "When the managing body are doing or are about to do an *ultra vires* act of such a nature as to produce *public* mischief, the attorney

general, as the representative of the public and of the government, may maintain an equitable suit for preventive relief. In *Trust Co. of Georgia v. State*, 109 Ga. 736, though the court held that under the facts the lower court erred in granting the injunction, it carefully reviewed the authorities, and said upon this point: "Our conclusion, therefore, both from reason and a decided weight of authority, is that the state, in her sovereign capacity, can appeal to the courts for relief by injunction, whenever either its property is involved, or public interests are threatened and jeopardized by any corporation, especially one of a public nature like a railroad company, seeking to transcend its powers, and to violate the public policy of the state." See, also, *Louisville & N. R. Co. v. Commonwealth*, 97 Ky. 675. In *Attorney General v. Jamaica Pond Aqueduct Corporation*, 133 Mass. 361, it was held by the supreme court of Massachusetts that an information in equity in the name of the attorney general will lie against a *quasi* public corporation doing and contemplating acts which are *ultra vires* and illegal, the necessary effects of which are to impair public rights. The case was decided on the point that the illegal acts created a public nuisance; but the court recognizes the principle that if the threatened act would injuriously affect or endanger the public interests the action will lie, citing a number of English cases to support the proposition. In *Attorney General v. Great Northern R. Co.*, 1 Drew. & Sm. (Eng.) 154, it was said by Vice Chancellor Kindersley: "The only remaining question is this: whether, if the interests of the public are injured or endangered by the practice complained of, it is competent for the attorney general, *ex officio* or on relation, to file an information to prevent it. On this point I entertain no doubt whatever. Wherever the interests of the public are damaged, by a company established for any particular purpose by act of Parliament, acting illegally and in contravention of the powers conferred upon it, I conceive it is the function and duty of the attorney general

to protect the interests of the public by an information; and that where, in the case of any injury to private interests, it would be competent for an individual to apply for an injunction to restrain a company from using its powers, for purposes not warranted by the act creating it, it is competent for the attorney general, in cases of injury to public interests from such a cause, to file an information for an injunction. The cases in which the attorney general comes forward on behalf of the public to ask this court to restrain a nuisance are an illustration of this principle. A nuisance may be detrimental to the public or to an individual; and it is very usual for the attorney general to come forward for an injunction to restrain it, so far as it affects the public, just as an individual may apply for an injunction to restrain it, where it affects himself. It is true that every injury is not a nuisance; but the right of the public to be protected against injury by the information of the attorney general is not confined to those injuries which come within the strict definition of a nuisance. Where it is the interest of the public to prevent an illegal act, such as this, being committed, it is competent for the attorney general to file an information to restrain it." The whole subject of the power of the state to maintain an action such as this in the supreme court of a state having similar constitutional provisions to those of this state is considered in a learned and exhaustive opinion by Chief Justice Ryan—which is one of the landmarks of modern jurisprudence—in *Attorney General v. Chicago & N. W. R. Co.*, 35 Wis. 425, and both the right of the state to maintain the action and the jurisdiction of the court to entertain it are clearly demonstrated. The subject is also discussed in Brice (Green), *Ultra Vires*, p. 706, where the authorities are collected. While there are cases announcing doctrines which may not be in entire harmony with these, we believe that, if for no other reason, the marvelous development of franchised public service corporations during the present generation

demands that of two opposing policies that one should be adopted which leaves the state most unfettered in its powers of regulation and control, and most free in adopting speedy and adequate means of safeguarding the public interest by direct action, if necessary, in the court of last resort.

But it is said that under the terms of the act the state railway commission, and not the attorney general, has been designated as the officer to enforce the law, and that the attorney general is not authorized to maintain the suit. The petition recites, however: "Comes now the state of Nebraska, by its attorney general, William T. Thompson, *by and with the consent and authority of * * * the Nebraska state railway commission, and for cause of action,*" etc. This allegation is not denied, and must be taken as true. It therefore appears that the action is brought by the attorney general, by the authority of the Nebraska state railway commission, the particular officers connected with the executive department of the state government who are specially empowered by the act itself to enforce its provisions. It may be said, further, that under the provisions of the statute specifying the power and duties of the attorney general it is the duty of the attorney general to appear for the state and prosecute all actions in the supreme court in which the state shall be interested or a party, and he may on his own motion bring and prosecute for the state any suit, matter or thing, civil or criminal, in which the state is interested, or relating to any matter connected with the executive department. Irrespective of what the powers of the attorney general might have been at common law, as the law officer of the crown, under this provision the power and the duty of determining when an action shall be brought by the state or in the interests of the state in this court devolves upon the attorney general as fully and to as great an extent as upon the governor or any other officer of the executive department. When, in the exercise of the powers thus conferred upon him by the constitution

and the law, the attorney general determines that the interests of the state require an action to be brought in this court, no question can arise as to his authority to institute or maintain the suit, if it is a matter in which the state is interested, or relating to the executive department. If, in his judgment, there is good cause to believe that any public service corporation, the regulated and fixed charges of which for services rendered to the public under its franchise have been disregarded, or that unreasonable, extortionate and excessive charges have been made for public service, it becomes his duty as a member of the executive department of the state to institute proceedings before the judicial department of the government whereby the rights of the state, exercised in behalf of all the people, may be preserved and vindicated. This is a well-recognized power and duty of such an officer both in England and in this country.

We have no hesitation, therefore, in holding that, in all civil cases in which the existence or regulation or control of a public franchise, the grant of which carries with it any exercise of a portion of the sovereign power of the state, is concerned, this court has original jurisdiction at the suit of the state, or of the attorney general in behalf of the state. To hold otherwise would be to divest the state of the most efficient manner of exercise of its regulatory and supervisory powers over the instrumentalities which it has created for its own public purposes, which we cannot believe it ever was the intention of the makers of the organic law to do. In the opinion of Mr. Commissioner RYAN, in *In re Petition of Attorney General*, 40 Neb. 402, it was said: "Such jurisdiction will not be entertained by this court in cases wherein the state is but a nominal party. The case must be such that the state, as a real, substantial party, has a direct interest in having determined." But, as has been pointed out in a number of the opinions, portions of which are quoted herein, a public wrong may consist of almost innumerable instances of private wrong; and that is espe-

cially true if it is a wrong of a nature which affects the rights of the people living in almost every city, town or village in the state as well as those living upon farms and ranches. The express companies now rival the post office in the extent of their operations, and possibly actually transact business for as many or more different persons in the course of a year than the railroad companies do. We think, therefore, that in cases such as this, where the people of the whole state are interested in the charges made for carriage upon public highways by common carriers, the state has a real and substantial interest, and the jurisdiction of this court is undoubted.

2. The objection that the petition does not show whether the defendant is a person, association or corporation probably should have been made by motion to make more specific. At all events, we think it is too late in the progress of this case to raise it now.

3. As to the contention that the suit was prematurely brought, sections 2 and 3 (laws 1907, ch. 91) of the act are as follows: "Section 2. (Schedules of Rates.) Within thirty days after the passage and approval of this act, all express companies doing business in this state shall file with the railway commission a complete schedule of the rates and classifications charged for the transportation of money or merchandise within this state by such company, which was in force on the first day of January, A. D. 1907.

"Section 3. (Rates.) Express companies may charge and receive for the transportation of merchandise within the state of Nebraska any sum not exceeding seventy-five per cent. of the rate as shown in the schedule provided for in section 2 of this act until after the state railway commission shall have provided a greater rate."

The defendant's contention is that the direction that an express company shall file a schedule of rates in force January 1, 1907, "within thirty days after the passage and approval of this act" must be construed as meaning within 30 days after the act becomes a law, and that the

act became a law on July 5; that the legislature intended the companies to have 30 days within which to prepare schedules after the law became effective, and that the rates provided for did not go into effect until 30 days after the filing of the schedules. It is our view that the legislature intended to adopt, and did adopt, the rates and classifications charged for the transportation of money or merchandise on the 1st day of January, 1907, as a basis or standard of comparison for the new rates, and that under the provisions of section 3 of the act it became unlawful, after the act took effect, for an express company to charge or receive for its services in this state any greater sum than 75 per cent. of the rate in force upon January 1, 1907. It cannot be reasonably contended that it was the intention of the legislature that the rates set forth in the written schedule filed should be taken as the basis, or as anything more than evidence of the rate which was actually charged on January 1. If, by mistake, the schedule filed showed a rate other than that actually charged, it would be unreasonable to say that a rate "as shown by the schedule" should be taken as the basis, as a narrow and literal reading of the act would require, and not the rate which was actually charged and in force on the 1st day of January, 1907.

We are of the opinion that the true interpretation of the meaning of the act is that a rate not exceeding 75 per cent. of the rates charged on the 1st of January, 1907, became the lawful rate as soon as the act took effect, but that 30 days thereafter were allowed the express companies to file with the railway commission a complete schedule of the rates and classifications in force on January 1, 1907. To so interpret the act places no harsh or unreasonable burden upon the express companies, by way of requiring new schedules and classifications to be made within such a short period of time as to necessitate undue haste in preparation, or such as to require the employment of extra assistance before the rates could easily be ascertained, since the only process necessary for their agents

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to perform in order to ascertain the lawful rate after the act took effect was to deduct 25 per cent. from the rates in force upon January 1, 1907. But, recognizing the difficulty and the necessary time required to prepare new written or printed schedules of rates and classifications of the multifarious articles of merchandise carried by express, the legislature wisely provided the space of 30 days in which to prepare and file such schedules before a penalty for noncompliance with this direction should be imposed. As soon as the act became operative, the rates prescribed took effect, but the time to file the schedules extended for 30 days thereafter. The action, therefore, was not prematurely brought.

We conclude, therefore, that the attorney general had authority to bring the suit in the name of the state, that this court has jurisdiction, and that the action was not premature.

The plea in abatement is therefore

OVERRULED.

STATE OF NEBRASKA V. WELLS, FARGO & COMPANY.

FILED MARCH 5, 1908. No. 15,306.

ACTION by the state. Plea in abatement. *Overruled.*

PER CURIAM.

The facts in this case are the same as in *State v. Pacific Express Co.*, ante, p. 823.

For the reasons stated in that opinion, the plea in abatement herein is

OVERRULED.

STATE OF NEBRASKA V. UNITED STATES EXPRESS COMPANY.

FILED MARCH 5, 1908. No. 15,308.

ACTION by the state. Plea in abatement. *Overruled.*

PER CURIAM.

The facts in this case are the same as in *State v. Pacific Express Co., ante*, p. 823.

For the reasons stated in that opinion, the plea in abatement herein is

OVERRULED.

STATE OF NEBRASKA V. AMERICAN EXPRESS COMPANY.

FILED MARCH 5, 1908. No. 15,309.

ACTION by the state. Plea in abatement. *Overruled.*

PER CURIAM.

The facts in this case are the same as in *State v. Pacific Express Co., ante*, p. 823.

For the reasons stated in that opinion, the plea in abatement herein is

OVERRULED.

STATE OF NEBRASKA V. ADAMS EXPRESS COMPANY.

FILED MARCH 5, 1908. No. 15,310.

ACTION by the state. Plea in abatement. *Overruled.*

PER CURIAM.

The facts in this case are the same as in *State v. Pacific Express Co.*, ante, p. 823.

For the reasons stated in that opinion, the plea in abatement herein is

OVERRULED.

JAMES BAXTER V. STATE OF NEBRASKA.

FILED MARCH 5, 1908. No. 15,525.

Rape: CONVICTION. Under an information charging rape by force upon a female child under the age of 18 years and not previously unchaste, a conviction may be had, even if the act was committed with the consent of the female child. *Hubert v. State*, 74 Neb. 226.

ERROR to the district court for Franklin county: ED L. ADAMS, JUDGE. *Affirmed.*

A. H. Byrum and W. O. Dorsey, for plaintiff in error.

W. T. Thompson, Attorney General, and Grant G. Martin, contra.

LETTON, J.

James Baxter, the plaintiff in error, was convicted in the district court for Franklin county of the crime of rape. From a judgment of conviction, he prosecutes error.

The indictment charges that James Baxter, "a male person over the age of 18 years, on the first day of July, A. D. 1907, then and there being in the said county of Franklin,

state of Nebraska, did then and there in and upon one Mary Koehn, a female child under the age of 18 years, to wit, of the age of 16 years, and not previously unchaste, unlawfully, violently, and feloniously make an assault, and her, the said Mary Koehn, unlawfully and forcibly and against her will feloniously did ravish and carnally know, she, the said Mary Koehn, then and there being a female child other than the daughter or sister of the said James Baxter." At the trial the evidence seemed to be insufficient to sustain the charge of forcible rape. The judge, therefore, charged the jury, in substance, that if they found that the prosecutrix was under the age of 18 years and not previously unchaste, and that the defendant had carnal knowledge of her, whether with or without her consent, it would constitute the crime of rape. The defendant's contention is that the information charged rape upon a female child forcibly and against her will, under the first clause of section 12 of the criminal code, and that the court erred in instructing the jury that it stated an offense under the second clause of that section. The identical question presented has been considered by this court in *Hubert v. State*, 74 Neb. 220, and, on rehearing, 74 Neb. 226. In the latter opinion it is said, speaking of section 12: "The object of the section is to define the crime of rape, and to provide the punishment therefor. At the common law it was necessary to charge that the act of intercourse was accompanied with force on the part of the defendant, and was against the will of the woman assaulted. * * * By the first clause of this section this element of the common law crime of rape is retained. By the second clause it is provided that the crime is established without proof of force under certain conditions. If the female consents to the act it is not rape, but this clause of the statute provides that if she is under the age of fifteen years she cannot consent, or if she is under the age of eighteen years and not previously unchaste she cannot consent, and so the whole section defines the common law crime of rape, with the condition that, when the accused

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has reached a certain age, and the female is of such tender years as to be presumed not to understand the nature of the act so as to enable her to consent to it, these elements take the place of the proof required by the common law that the act was with force and against her will." The doctrine of this case is very ingeniously and vigorously assailed in the reply brief on behalf of plaintiff in error, and, among other things, it is said: "The second clause of section 12, in fact, defines and denounces a separate and distinct crime to that denounced in the first section. It was unknown to the common law, and had no existence until that clause was enacted. * * * The second clause of section 12 makes the act of carnal knowledge of a female child a felony when committed with her consent, though at common law the fact of consent would have been a complete defense." This statement is hardly correct. Lord Coke says: "Rape is felony by the common law, declared by parliament for the unlawful and carnal knowledge and abuse of any woman above the age of ten years against her will, or of a woman child, under the age of ten years, with her will, or against her will, and the offender shall not have the benefit of clergy." 3 Coke, Institutes, 60. Lord Hale defines the crime as follows: "Rape is the carnal knowledge of any woman above the age of ten years against her will, and of a woman child under the age of ten years with or against her will." 1 Hale, P. C. (Eng.) 628.

The only difference between statutory and common law rape upon a female child under the age of consent is that by the statutes the age of consent has been raised from 10 to 18 years. Upon a reexamination of the question, we are convinced that the opinion of Judge SEDGWICK in *Hubert v. State*, *supra*, states the law correctly, and we are content to abide by the rule there announced. While the information charged rape with force, yet it contained all the material allegations necessary to charge the crime of rape upon a female child under the statute, and the words charging force may be disregarded as surplusage.

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Bishop, Statutory Crimes (3d ed.), sec. 486. It was immaterial, in order to constitute the crime charged, whether the female child consented or did not consent to the assault. The law conclusively presumes that she was incapable of giving consent, and that it was therefore against her will.

Under the law and the evidence, the instruction given by the court was fully warranted, and the judgment of the district court is

AFFIRMED.

GEORGE BRANDT V. STATE OF NEBRASKA.

FILED MARCH 5, 1908. No. 15,565.

Criminal Law: REVIEW. Under the provisions of chapter 162, laws 1907, providing for appeals to the supreme court, only judgments and sentences upon convictions for felonies and misdemeanors under the criminal code may be brought to this court by petition in error. All other cases must come here by appeal, and notice must be given, either as specified in section 3 of the act, or under the provisions of supreme court rules 33 to 37, inclusive.

ERROR to the district court for Adams county: ED L. ADAMS, JUDGE. *Objection to jurisdiction. Sustained.*

John C. Stevens, for plaintiff in error.

W. F. Button, contra.

LETTON, J.

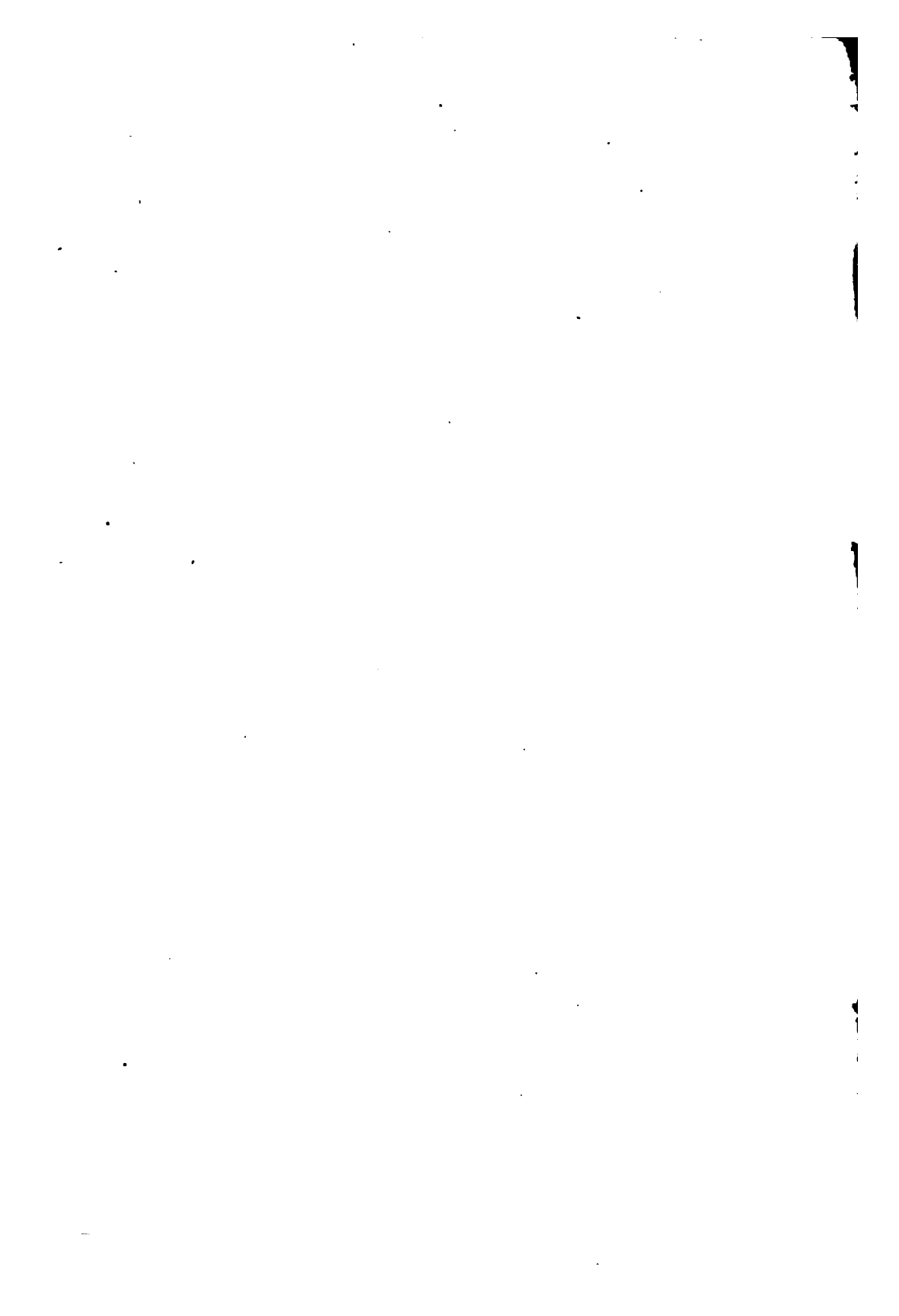
George Brandt was adjudged guilty of the violation of a city ordinance of the city of Hastings in the police court of that city. He appealed to the district court for that county, where the appeal was dismissed. A petition in error was filed in this court, complaining of errors committed by the district court in dismissing his appeal. After the filing of the petition in error the deputy attorney general, being under the impression that the case was

error from a conviction of a misdemeanor under the criminal code, waived the issuance and service of summons in error. A few days afterwards he ascertained that the case involved the violation of a city ordinance, which was not a crime under the criminal code, and he thereupon withdrew his appearance and acknowledgment of service. Mr. W. F. Button, city attorney of the city of Hastings, appears specially, objecting to the jurisdiction of the court, for the reason that no summons in error or notice of appeal had been served upon any person having authority to act for the city of Hastings.

The question before us is upon the special appearance. The record shows that Brandt was charged with "keeping his saloon open after hours, or on Sunday, September 29, 1907." No particular hours are specified in the criminal code during which it is a crime for a saloon to be kept open, so that the offense with which Brandt was charged was not a violation of any criminal law of this state, but of a local regulation or ordinance of the city of Hastings. Section 1, ch. 162, laws 1907, providing for appeals to the supreme court, provides: "The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, except judgments and sentences upon convictions for felonies and misdemeanors under the criminal code of this state, shall be by filing in the supreme court," etc. Sections 2 and 3 of the act provide for the manner of docketing the case in the supreme court, and for the giving of notice of appeal. Under this statute only judgments and sentences upon conviction for felonies and misdemeanors under the criminal code of the state may be brought to this court by petition in error. All other cases must come here by appeal, and notice must be given, either as specified in section 3 of the act, or under the provisions of supreme court rules 33 to 37, inclusive. Rule 36 provides that notice of appeal "shall be served upon the appellees named therein or their attorney or attorneys of record in the court below."

In appeals from convictions for violations of city ordinances which are not crimes under the criminal code of the state, service of notice of appeal should be made upon the city or village, or upon the attorney of record in the court below. This has not been done; hence, as the case now stands, the court has no authority to proceed further, and the objections of the city attorney seem to be well taken, and are therefore

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2. The jurisdiction conferred on the supreme court by the constitution extends to all cases in which the state, through its

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- proper officers, seeks the enforcement of public right or the restraint of public wrong. *State v. Pacific Express Co.*... 823
3. A wrong which affects the rights of the people generally, when committed by a public service corporation, is a public wrong, and an action to restrain the wrong by the state is within the jurisdiction of the supreme court. *State v. Pacific Express Co.* 823

Covenants.

1. A covenant in a deed that "I hold said premises by good and perfect title," if untrue, is broken when made. *Webb v. Wheeler* 438
2. Where plaintiff is in possession of premises and can recover the value of his improvements under the occupying claimant's act, he cannot recover the value thereof in an action for damages for breach of covenant. *Webb v. Wheeler*.... 438

Creditors' Suit.

Where a conveyance is set aside as fraudulent and the land is insufficient to pay the judgment, the grantee must apply the rents on the judgment. *First Nat. Bank v. Gibson*.... 577

Criminal Law. See ASSAULT AND BATTERY. BURGLARY. EMBEZZLEMENT. HOMICIDE. INCEST. INDICTMENT AND INFORMATION. LARCENY. RAPE.

1. In a prosecution for embezzlement, an expert accountant may examine voluminous accounts and testify as to the result of his examination. *Bode v. State*..... 74
2. In a prosecution for embezzlement, certain admissions held admissible, though tending to show the commission of other offenses. *Bode v. State* 74
3. Instructions must be construed together, and if then they correctly announce the rule applicable to the issues and evidence they will be upheld, though a paragraph standing alone might be faulty. *Bode v. State* 74
4. Where the state elects to proceed on one of several counts in an information, and the court instructs the jury that their verdict must respond to the charge in that count, a verdict of guilty, as charged in the information, held sufficient. *Bridges v. State* 91
5. Where a requested instruction contains a statement not warranted by the evidence, held not error to strike the unwarranted statement, and give the instruction as modified. *Bridges v. State* 91
6. A wife may sign and file a complaint against a husband for rape. *Harris v. State* 195

Criminal Law—Continued.

7. Where the question as to misconduct of the county attorney in the prosecution has been decided by the trial court on conflicting evidence, the decision will not be disturbed unless unsupported by testimony and clearly wrong. *Harris v. State* 195
8. General assignments of error in ruling on evidence will not be discussed unless specifically called to the attention of the court by brief or oral argument, where no manifest error appears. *Harris v. State* 195
9. In a prosecution for rape, it is not error for the court to refuse an instruction as to the necessity for corroboration, where he has properly instructed on that question on his own motion. *Harris v. State* 195
10. Proof of reputation is confined to reputation in the vicinity in which the party lives or in which he had formerly resided. *Younger v. State* 201
11. Where articles pertinent to the issue are offered in evidence, the court will not exclude them on account of the manner in which they were obtained. *Younger v. State*..... 201
12. It is not error to refuse an instruction removing certain evidence from the consideration of the jury where the evidence was received without objection and no motion was made to strike it out. *Younger v. State*..... 201
13. Where defendant in a prosecution for rape calls out from the prosecutrix a description of her assailant, the person to whom complaint was made may testify that the prosecutrix stated that she had been assaulted by a negro, and give her description of him then made. *Younger v. State*.. 201
14. Where the testimony of the prosecutrix in a rape case as to the assault and the identity of her assailant is fully corroborated, *held* not prejudicial error to omit to instruct as to the necessity of corroboration. *Younger v. State*..... 201
15. Purely rebuttal evidence may be given by witnesses whose names are not indorsed on the information. *Clements v. State* 313
16. Where a witness for a defendant on trial for murder exhibits a hat to the jury and conveys the impression that certain holes therein were made by shots fired by the deceased, the state can show that the holes are not shot holes, though the hat has not been formally offered in evidence. *Clements v. State* 313
17. It is not error to refuse an instruction which does not contain a correct statement of the law applicable to the facts shown by the evidence. *Clements v. State*..... 313

Criminal Law—Continued.

18. The introduction of evidence to impeach a witness does not require the court to instruct the jury to totally disregard his evidence. *Clements v. State* 313
19. Instruction as to reasonable doubt *held* not ground for reversal. *Clements v. State* 313
20. It is not error to refuse to instruct the jury that they should carefully scrutinize evidence of the prosecuting attorney because of the natural tendency of persons in his position to remember only such matters as are favorable to the state. *Clements v. State* 313
21. Error cannot be predicated on a single expression in an instruction, if the whole instruction correctly states the law. *Clements v. State* 313
22. Newly discovered evidence which is doubtful in character and merely cumulative is not ground for a new trial. *Clements v. State* 313
23. A judgment in a misdemeanor case on conflicting evidence will be upheld unless clearly wrong. *Gebhardt v. State*.... 363
24. Court's directions to jury *held* not to warrant setting aside verdict. *Gebhardt v. State* 363
25. Instructions in a misdemeanor case *held* without error. *Gebhardt v. State* 363
26. Where a defendant is prosecuted before a justice of the peace by complaint and warrant for violation of a village ordinance, and the acts charged are misdemeanors under the laws of the state, he cannot appeal under sec. 1006 of the civil code. *Ruffing v. State* 555
27. The right of appeal given by sec. 324 of the criminal code applies to cases prosecuted for the violation of village ordinances under sec. 52, art. I, ch. 14, Comp. St. 1907. *Ruffing v. State* 555
28. Unless the discretion of the trial court in refusing a continuance has been abused, a reviewing court will not interfere. *Cate v. State* 611
29. Where a number of witnesses have testified to a fact not in dispute, the trial court may in its discretion limit the number of witnesses testifying to such fact. *Cate v. State*..... 611
30. Though part of the instructions standing alone may not be technically correct, yet if as a whole they state the law they will be upheld. *Cate v. State*..... 611
31. Under the evidence, failure to instruct as to insanity, where no instruction was requested, *held* not error. *Cate v. State*.. 611
32. In a prosecution for maliciously killing hogs, admission of

Criminal Law—Concluded.

- evidence as to their value at a certain price per hundred-weight, leaving the jury to decide as to the weight of the hogs, *held* not error. *Carson v. State*..... 619
33. A docket entry that "the court finds that there is probable cause to believe that the defendant is guilty as charged in the complaint," *held* to sufficiently show that the magistrate found that an offense had been committed. *Carson v. State*, 619
34. Where evidence was in sharp conflict, and there was sufficient evidence to sustain a verdict of guilty, the finding cannot be reversed. *Carson v. State*..... 619
35. Where an information charged the malicious killing of 14 hogs of the value of \$120 on the 5th day of May, 1906, and the evidence showed 5 hogs killed on the 23d day of April, 1906, of the value of \$44.17, the offense being identified as the one charged in the information, *held* that the verdict responded to the charge in the information. *Carson v. State*, 619
36. The question as to whether the acts charged, if committed, were maliciously done, *held* one of fact for the jury. *Carson v. State* 619
37. To obtain a review of instructions, the record must show that exceptions were taken. *Carson v. State*..... 619
38. An instruction which requires a defendant to prove beyond a reasonable doubt his innocence of a graver crime before he can be found guilty of a less heinous offense, *held* erroneous. *Kennison v. State* 688
39. One charged as principal cannot be convicted on evidence tending only to show that he was an accessory. *Skidmore v. State* 698
40. In the prosecution of a bank officer for embezzlement, *held* error to submit the fact of his having overdrawn his account with the bank as proof of guilt. *Chamberlain v. State*, 812
41. An instruction which shifts the burden of proof to the defendant, *held* erroneous. *Chamberlain v. State*..... 812
42. Under an indictment charging a bank officer with embezzling its funds on a certain date, evidence of embezzlement of different amounts at different times before that date, *held* admissible. *Chamberlain v. State*..... 812
43. Under ch. 162, laws 1907, only judgments and sentences on convictions for felonies and misdemeanors under the criminal code may be brought to the supreme court by petition in error. All other cases must come by appeal, and on notice as specified in section 3 of the act or under the supreme court rules 33 to 37, inclusive. *Brandt v. State*..... 843

Damages.

In an action by a married woman for personal injuries, it is proper to show that she has been incapacitated by her injuries from performing labor, for the purpose of showing the nature and extent of her injuries. *Bliss v. Beck*..... 290

Deeds.

Deed construed, and held to convey the land in dispute. *Lamson v. Village of Elm Creek*..... 369

Divorce.

Where neither of the parties had resided in the state continuously since the marriage, or continuously for six months immediately preceding the filing of the petition, the district court was without jurisdiction. *Keil v. Keil*..... 496

Drains. See EMINENT DOMAIN.

1. The act of 1905 (laws 1905, ch. 161), relative to the organization of drainage districts, does not contemplate the inclusion of a railroad company's right of way, depot grounds and appurtenances as a part of the district. *Barnes v. Minor* 189
2. In a proceeding to establish a drainage ditch, if the county board possesses jurisdiction, injunction will not lie on account of irregularities in the exercise of the power conferred. *Campbell v. Youngson* 322
3. The drainage act of 1881 (laws 1881, ch. 51) confers power to create districts for draining "marsh or swamp lands" alone, and does not confer power to divert the flow of running streams or natural surface water drains. *Campbell v. Youngson* 322
4. The term "marsh or swamp lands," as used in ch. 51, laws 1881, defined. *Campbell v. Youngson* 322
5. Under the facts, held that a county board was without jurisdiction to divert the waters of certain streams from their natural flow to prevent overflows, and that it had no authority to take plaintiff's land against his will for the purpose of draining lands within a proposed drainage district. *Campbell v. Youngson* 322
6. The constitution does not prohibit contemporary legislative acts providing different modes for the formation of drainage districts. *State v. Hanson* 724
7. The establishment of the boundaries of a proposed drainage district is *prima facie* evidence that the county commissioners proceeded regularly in the establishment thereof. *State v. Hanson* 724
8. Ch. 153, laws 1907, held to vest in a county board power to

Drains—Concluded.

determine the public utility of a proposed drainage district, and a discretion not to fix the boundaries if the reclamation of the district would not promote the public health or welfare. *State v. Hanson* 738

9. The act of 1907, ch. 153, *held* not to be applied unless the county board should prescribe a drainage district, which, if organized and improved, would promote the public health or welfare. *State v. Hanson* 738

Elections.

1. Where an individual has filed the application required by sec. 5 of the primary election law (laws 1907, ch. 52), and has duly qualified as a candidate of a political party, and the requisite number of members of another party file a petition complying with sec. 45 of that act, asking that his name be placed on the ballot of their party, the officer making up the ballot must place his name on the ballots of both parties. *State v. Junkin* 1
2. The same person may be the candidate of more than one political party for nomination at a primary election, but he cannot be the nominee of any party unless he receives the requisite number of votes cast by that party. *State v. Sheldon* 4
3. Sec. 22, art. I of the constitution, providing that there shall be no hindrance to the right to exercise the elective franchise, does not apply to an election upon the formation of a drainage district under sec. 153, laws 1907, nor to one for the election of officers thereof. *State v. Hanson*..... 724
4. Ch. 153, laws 1907, providing for submission of the question of organization and the election of officers of a drainage district, *held* not to call for the exercise of the elective franchise secured to all electors by sec. 22, art. I of the constitution. *State v. Hanson* 738

Embezzlement.

1. An information against a city treasurer for embezzlement under sec. 124 of the criminal code need not allege that the city was organized. *Bode v. State* 74
2. An information against a city treasurer for embezzlement *held* good, though not alleging that accused embezzled the money while holding it as city treasurer. *Bode v. State*.. 74
3. Evidence *held* to sustain conviction of embezzlement. *Bode v. State* 74
4. In charging embezzlement of money of an estate by a county judge in violation of sec. 121 of the criminal code, *held* that an allegation that the money embezzled belonged

Embezzlement—Concluded.

- to the estate was a sufficient allegation of ownership.
Hendee v. State 80
5. In charging embezzlement of a certificate of deposit, *held* sufficient to describe the instrument as it appeared when it came into the possession of the accused. *Hendee v. State*, 80
6. Evidence *held* sufficient to sustain a conviction. *Hendee v. State* 80
7. An indictment for embezzlement is sufficient if it sets forth the crime in the language of the statute, without averring the particular acts in which the offense consists. *Chamberlain v. State* 812

Eminent Domain.

1. Ch. 153, laws 1907, authorizing the formation of drainage districts and the condemnation of private property, *held* not to permit the organization of a corporation in furtherance of private interests or the taking of property for private purposes. *State v. Hanson* 724
2. The phrase, "with a view to promoting the interest of said drainage district," used in ch. 153, laws 1907, relative to the duties of county commissioners in establishing drainage districts, means the public interest. *State v. Hanson*..... 724
3. An act of the legislature, ch. 153, laws 1907, providing for the organization of drainage districts, *held* not to amount to the taking of private property for private use, or for public use without just compensation, nor the taking of property without due process of law. *State v. Hanson*..... 738

Estoppel. See MORTGAGES, 6.

1. Where real estate brokers arranged by correspondence with a landowner for a sale of his land and received a commission therefor, *held* that they were estopped to deny they were agents of the vendor. *Northup v. Bathrick*..... 36
2. A mortgagee is estopped to deny the statements in a mortgage, recorded by him, as to the rate of interest and maturity of the notes secured, in a suit against a subsequent purchaser. *Stewart v. Walker* 68
3. The state will not be allowed to oust a corporation of its franchises where it has seen the corporation expend large sums in improvements under rights claimed under its charter. *State v. Lincoln Street R. Co.*..... 333

Evidence. See CRIMINAL LAW. INSURANCE, 2.

1. In making an assessment a board of equalization is presumed to have acted on sufficient competent evidence. *Western Union T. Co. v. Dodge County*..... 23

Evidence—Concluded.

2. Declarations against interest cannot be explained away by counter declarations. *Harrison v. Harrison*..... 103
3. Evidence of facts additional to the message is admissible to prove damages for delay in sending a telegram. *Smith v. Western Union T. Co.* 395
4. A question calling for the opinion of the witness on the very matter in issue is improper. *Kendrick v. Furman*... 797
5. Where one claims his property has been damaged by certain acts of the defendant, it is not proper to ask the witness in what manner he has been damaged, but he should state the facts. *Kendrick v. Furman* 797
6. Evidence held to entitle appellee to an injunction restraining appellant from maintaining a dam so as to interfere with appellee's water-wheel. *Kendrick v. Furman* 797

Executors and Administrators.

1. Where it is sought to charge a legal representative with debts owing by him to the deceased, the burden of proof is on the party applying; but, when the contracting of such indebtedness is admitted, the burden is on the legal representative to show payment. *In re Estate of Mall*..... 233
2. Evidence held to show that an administrator was indebted to the estate. *In re Estate of Mall* 233

Exemptions.

Under sec. 531f of the code, in an action by a wage-earner against a creditor, who has by garnishment in a foreign jurisdiction obtained wages earned within 60 days before garnishment, it is necessary to allege that plaintiff is a resident and the wages are exempt. *Corliss v. Plano Mfg. Co.* 366

Fraudulent Conveyances.

Real estate conveyed in fraud of creditors may be levied on and sold under an execution as the property of the grantor, and the purchaser may sue the fraudulent grantee to cancel the conveyance and to quiet title. *Becker v. Linton*..... 655

Guardian and Ward.

1. Sec. 27, ch. 34, Comp. St. 1907, requires a guardian to receive from the county court an order authorizing him to loan the funds of his ward, and if he loans them without such authority, and a loss ensues, he is liable therefor. *In re Estate of O'Brien* 125
2. The personal direction and supervision of the county judge in making loans for a guardian is not equivalent to an order of the court authorizing the loans. *In re Estate of O'Brien*, 125

Guardian and Ward—Concluded.

3. The approval by the county court, without notice to those interested, of annual reports of a guardian, wherein he reports loans of his ward's funds without an order of the court, is not equivalent to an order of the court authorizing such loans. *In re Estate of O'Brien* 125

Highways.

1. A public road may be improved to accommodate footmen as well as those using it for teams, wagons or other vehicles. *Hitchcock v. Zink* 29
2. A sidewalk constructed outside the traveled way for teams, but within the boundaries of the road, does not constitute an added burden to the easement. *Hitchcock v. Zink*..... 29
3. The owner of the fee cannot complain that a sidewalk is being constructed along a public road by private parties with permission of the county commissioners. *Hitchcock v. Zink* 29

Homestead.

- A homestead of less value than \$2,000 cannot be sold at administrator's sale either for the discharge of incumbrances thereon or to pay debts of the estate. *Holmes v. Mason*.... 448

Homicide.

1. Where the circumstances attending a homicide are testified to by eye-witnesses, it is error to instruct that there is a presumption of malice from the fact of the killing or from the use of a deadly weapon. *Kennison v. State* 688
2. An instruction *held* to assume that, if the defendant unlawfully killed the deceased, he was guilty of murder, and to place of burden on him to establish beyond a reasonable doubt the existence of mitigating circumstances, and therefore erroneous. *Kennison v. State* 688
3. An instruction which assumes the crime to be murder, and requires proof of a lower degree to be made by the defendant, *held* inconsistent with instructions that the burden of proof remains with the state throughout the trial, and that the defendant is presumed innocent until proved guilty beyond a reasonable doubt. *Kennison v. State* 688
4. An instruction which assumes the crime to be murder in the second degree *held* erroneous, as the question of intent is for the jury. *Kennison v. State* 688

Husband and Wife. See DAMAGES.

1. An antenuptial contract *held* executory, and not to vest any estate in the children of the parties to the contract. *Becker v. Linton* 655

Husband and Wife—Concluded.

2. A purchaser of a note signed by a married woman cannot invoke the rule of innocent purchaser, as against the defense of coverture, by showing that he had no notice of such coverture when he purchased the note. *Northwall Co. v. Osgood* 764
3. The signing of a note by a married woman creates no presumption of consideration or of her intent to bind her separate estate. *Northwall Co. v. Osgood* 764

Incest.

1. In a prosecution for incest, an instruction as to corroborative evidence held proper. *Bridges v. State*..... 91
2. A girl under 16 years of age, who under physical and moral coercion maintained incestuous relations with her father, held not an accomplice. *Bridges v. State*..... 91
3. Evidence held sufficient to sustain a conviction. *Bridges v. State* 91

Indictment and Information. See EMBEZZLEMENT.

1. An information charging embezzlement by a county judge under sec. 121 of the criminal code, which alleged that the property came into the possession of defendant "by virtue or under color of his relation as an officer," held not void for duplicity. *Hendee v. State* 80
2. Where designation of the race or color of the accused cannot result in any prejudice to him, it is not a ground for quashing the information. *Harris v. State*..... 195
3. Pending an appeal under sec. 324 of the criminal code from a judgment of a magistrate, the district court may permit the filing of an amended complaint. *Ruffing v. State*..... 555

Injunction.

1. Equity will not enjoin the breach of an oral contract which by its terms is not to be performed within one year. *Platte County I. T. Co. v. Leigh I. T. Co.*..... 41
2. Breach of an oral contract will not be restrained, where its terms are so indefinite that a court would not decree specific performance thereof. *Platte County I. T. Co. v. Leigh I. T. Co.* 46
3. Equity will enjoin repeated trespasses. *Hackney v. McIntosh* 49
4. The destruction of a fence and threatened repetition thereof as often as it may be replaced entitles the owner to an injunction against the invader, though he may be solvent. *Munger v. Yeiser* 285

Injunction—*Concluded.*

5. In an action to enjoin a trespass, defendant cannot defeat the action by showing an outstanding right in a third party to have a deed in the plaintiff's chain of title declared a mortgage. *Munger v. Yeiser* 285
6. Where, in an action to restrain a trespass on real property, the same is sold during the action, and the vendee substituted as plaintiff, evidence taken before such transfer should be considered. *Munger v. Yeiser* 285
7. A petition for an extraordinary writ will receive a strict construction. *School District v. DeLong*..... 667

Insurance.

1. Where a local agent of an insurance company failed to renew his certificate of authority from the state auditor, but acted as agent of the company, *held*, that the company is bound by his acts. *Hunt v. State Ins. Co.*..... 33
2. Parol evidence *held* inadmissible to show that a written application for insurance was conditioned on an agreement that the company was to make a real estate loan to the applicant. *Albright v. State Life Ins. Co.*..... 64
3. A solicitor of insurance leaving the service of the company, *held* entitled to her commissions. *Martin v. Fraternal Life Ass'n* 224
4. Under the evidence, that a solicitor of insurance was assisted by a field agent of the company, *held* not a defense to her claim for commissions. *Martin v. Fraternal Life Ass'n*.... 224
5. Evidence *held* to show that no contract of insurance was created. *Lowe v. St. Paul Fire & Marine Ins. Co.*..... 499
6. Evidence *held* insufficient to establish a contract for insurance. *Shoemaker v. Commercial Union Assurance Co.*..... 637
7. To sustain a defense of suicide, it is necessary to allege and prove that suicide is a violation of the constitution or laws of the order in force at time of death. *Sebesta v. Supreme Court of Honor* 760
8. Evidence *held* insufficient to show self-destruction. *Sebesta v. Supreme Court of Honor* 760

Interest. See BANKS AND BANKING, 2, 3. CONTRACTS, 3.

1. Simple interest may, when due, be added to the principal by including it in a renewal or a separate note, and thus be made to bear interest. *Sanford v. Lundquist*..... 408
2. Where judgment has been entered on a penal bond to secure payment in monthly instalments, part of which was not due, interest should be computed only on instalments not paid at maturity, and then from date of maturity to time of payment. *Dike v. Andrews* 455

Intoxicating Liquors.

1. In a prosecution under sec. 20, ch. 50, Comp. St. 1905, for unlawfully keeping intoxicating liquors with intent to sell the same without a license, *held* prejudicial error to permit the introduction in evidence of the search warrant under which the premises were searched and the liquors seized. *Weinandt v. State* 161
2. In a prosecution under said section, *held* not error to admit evidence of the keeping of other liquors in addition to those charged. *Weinandt v. State* 161
3. In such prosecution, *held* not error for the jury to taste of the liquors taken from defendant's premises under the search warrant. *Weinandt v. State* 161
4. Instructions not limiting the right to a conviction to the keeping of the liquors charged in the information *held* erroneous. *Weinandt v. State* 161
5. The statutory qualification of a freeholder as a petitioner on an application for a saloon license is established by showing that he has by record or documentary evidence, and in good faith believes himself to have, a freehold estate in lands within the prescribed district. *Starkey v. Palm* 393
6. The provisions of ch. 50, Comp. St. 1907, apply only to intoxicating liquors, and when one charged with selling without license "malt and intoxicating liquor, to wit, Malt Tonic," introduces evidence tending to show that it was not intoxicating, he is entitled to have the question submitted to the jury. *Luther v. State* 432
7. An administrator cannot recover any part of the amount paid for a liquor license because of the licensee's death before the expiration of the term of the license. *Wood v. School District* 722

Judges.

1. Sureties on the official bond of a county judge are not liable for money which did not come to his possession by virtue of his office. *Stephens v. Hendee* 754
2. Where a county judge receives personal property belonging to an estate prior to the appointment of an administrator, he does not receive it by virtue of his office, and the sureties on his official bond are not liable if he subsequently converts the property. *Stephens v. Hendee* 754

Judgment.

1. A decree affecting the title to land owned by a resident is absolutely void where the only notice was by publication and no appearance was made. *Payne v. Anderson* 216
2. Where the determination of a matter has been committed to

Judgment—Concluded.

- a particular board, and no appeal is provided from its decision, its determination is final, and not subject to collateral attack. *Campbell v. Youngson* 322
3. The city of Lincoln brought suit to oust a street car company from possession of certain streets, and on demurrer judgment went in favor of defendant, which judgment is in full force. *Held*, That if the city represented the state in such action, the force of the judgment as a bar in a subsequent action by the state could extend only to the rights of the company in the streets then occupied by its tracks. *State v. Lincoln Street R. Co.* 333
4. A judgment on service by publication against a resident on whom personal service might have been had is void. *Wagner v. Lincoln County* 473
5. In a suit to enjoin the collection of a judgment of the county court as void, the petition must affirmatively state facts which show its invalidity. *Zimmerman v. Trude* 503
6. The plea of *res judicata* applies to every point which properly belonged to the subject matter of litigation which the parties, exercising reasonable diligence, might have brought forward. *First Nat. Bank v. Gibson* 580
7. Where the validity of a certain deed was the sole issue tried in an action *quia timet*, a decree "that the title be quieted in plaintiff" will not bar defendants from asserting rights to possession or title acquired under other contracts. *Wetherell v. Adams* 589
8. Where a question of fact or of law has been litigated in a court having jurisdiction, its judgment cannot be collaterally attacked in another court. *Becker v. Linton* 655
9. A judgment of a court having jurisdiction is conclusive of the fact that the indebtedness existed at the time of the rendition of the judgment. *Becker v. Linton* 655
10. Sec. 462 of the code authorizes the revival of a dormant judgment against a nonresident on service by publication. *White v. Ress* 749
11. Sec. 462 of the code, authorizing the revival of a dormant judgment on service by publication, is not repugnant to either the state or federal constitution. *White v. Ress* 749

Judicial Sales.

- The purchaser of realty at a judicial sale buys at his peril. *Hitchcock County v. Cole* 375

Jury.

1. An opinion based on newspaper reports *held* not ground for challenge of a juror. *Bridges v. State* 31

Jury—Concluded.

2. In a prosecution for contempt, defendant is not entitled to trial by jury. *Connell v. State* 296
3. In a law action a party is entitled to a jury trial as a matter of right. *Yeiser v. Broadwell* 718

Larceny.

- One who advises others to commit larceny, but who is several miles distant at the time of the commission of the offense, but assists in the disposal of the proceeds after the theft, held an accessory. *Skidmore v. State* 698

Licenses.

- In 1904 a city passed an ordinance imposing an occupation tax on billiard and pool halls, and on May 26, 1906, a second ordinance went into effect requiring the keepers of such halls to apply to the mayor and council for a license. *Held*, That one who had paid the occupation tax prior to the ordinance of 1906 could not restrain the officers of the city from prosecuting him for conducting his business without a license. *McCarter v. City of Lexington* 714

Limitation of Actions. See COUNTIES AND COUNTY OFFICERS, 2. PLEADING, 3. QUIETING TITLE, 2. TAXATION, 11.

1. Where after maturity of a mortgage interest is paid annually, a right of action is not barred until ten years after the last payment. *Gillilan v. Fletcher* 237
2. A warrant issued by a city for a valid debt is a written acknowledgment thereof, and arrests the running of the statute of limitations. *Abrahams v. City of Omaha* 271
Rogers v. City of Omaha 591
3. Sec. 117, ch. 23, Comp. St. 1907, does not apply to void administrator's sales, and an action by an heir to quiet title to the homestead may be maintained within ten years after his right of action accrues or the attainment of his majority. *Holmes v. Mason* 448

Master and Servant.

1. A master must use reasonable care to provide reasonably safe appliances and a reasonably safe place to work. *Kotera v. American S. & R. Co.* 648
2. Whether a master was negligent in failing to exercise reasonable care to provide a reasonably safe place to work is a question for the jury. *Kotera v. American S. & R. Co.* 648
3. Whether a master was negligent in not exercising reasonable care to provide reasonably safe appliances is a question for the jury. *Kotera v. American S. & R. Co.* 648
4. A servant may assume that his master has used due dili-

Master and Servant—Concluded.

gence in providing reasonably safe appliances and a reasonably safe place to work, and he does not assume the risk arising from the master's negligence, unless he knows of the danger. *Kotera v. American S. & R. Co.*..... 648

Mechanics' Liens.

1. A verified account filed to secure a mechanic's lien for material furnished is no evidence of its delivery. *Searle & Chapin Lumber Co. v. Jones* 567
2. Evidence held insufficient to show delivery to defendants of certain material. *Searle & Chapin Lumber Co. v. Jones*.... 567

Money Received.

Evidence in an action for money received held to sustain judgment for defendant. *Northwest Thresher Co. v. Eddyville State Bank* 377

Mortgages.

1. Where a mortgage specifies the date of maturity and rate of interest of notes, the mortgagee cannot in a suit against a subsequent purchaser show that the notes matured at an earlier date or bore a higher rate of interest than specified in the mortgage. *Stewart v. Walker* 68
2. Where a mortgagee records a mortgage which describes notes as maturing at a later date or bearing a lower rate of interest than named in the notes, he must suffer the consequences of such error, rather than an innocent purchaser. *Stewart v. Walker* 68
3. An order confirming a foreclosure sale, in the absence of fraud, cures all defects and irregularities in the appraisal, and is conclusive on all parties to the suit. *Paule v. Scofield* 100
4. Where defendant, in violation of his agreement not to purchase a mortgage on plaintiff's homestead, purchased it, and on foreclosure bought the land, held that plaintiff, who was not served with notice of the foreclosure, was entitled to redeem by paying the amount paid for the mortgage, with interest at 7 per cent. *Unangst v. Southwick* 112
5. Evidence held to sustain the findings. *Sanford v. Lundquist* 414
6. Where in a suit to set aside a conveyance of land for fraud plaintiff obtains a decree by a settlement in which he agrees to discharge a mortgage on the premises, in a subsequent suit to foreclose he is estopped to deny the amount of the mortgage or to claim that the mortgagee might have obtained a partial satisfaction from a source other than the land. *Hannan v. Rihner* 521

Mortgages—Concluded.

7. Where a request for stay of order of sale is filed within 20 days of the rendition of a decree, the court is without power to sell the mortgaged premises within nine months of the entry of the decree. *Jenkins Land & Live Stock Co. v. Attwood* 806
8. A request for a stay filed before the entry of a decree is as effective as though filed within 20 days thereafter. *Jenkins Land & Live Stock Co. v. Attwood* 806
9. An owner of the equity of redemption, who has sold his interest after his appearance as defendant in a foreclosure suit, may file a request for a stay of sale. *Jenkins Land & Live Stock Co. v. Attwood* 806
10. Confirmation will not validate a void sale. *Jenkins Land & Live Stock Co. v. Attwood* 806

Municipal Corporations. See STREET RAILWAYS. 4-6.

1. Where an ordinance recited that it was passed under an act afterwards declared unconstitutional, the city having power under a prior statute to enact the ordinance, *held* that the mistake in reciting the power to act did not deprive the city of the power which it actually had. *State v. Several Parcels of Land* 11
2. Where the existence of a municipal corporation is not questioned by the state, it cannot be brought in issue by a private individual in a collateral proceeding, nor can the validity of annexation proceedings be tested in such a suit; where the evidence shows acquiescence in the proceedings and the payment of taxes levied by the corporation for several years. *State v. Several Parcels of Land* 11
3. Physical incapacity is not available to extend the time for serving notice to fix a statutory liability upon a city. *Ellis v. City of Kearney* 51
- 4. A statutory notice to a city of injuries is not void for surplusage, which has not prejudiced the city. *Jacobsen v. City of Omaha* 56
5. In an action for injuries, evidence *held* not to show abandonment of a pathway for pedestrians along which the city had previously constructed a sidewalk. *Jacobsen v. City of Omaha* 56
6. The provision of the Omaha charter (Comp. St. 1903, ch. 12a, sec. 901), providing that the mayor and council shall not allow claims under certain circumstances, *held* a limitation of power. *Redell v. City of Omaha* 178
7. The power of the legislature over procedure, within limits not impairing the inherent powers of the courts, is not

Municipal Corporations—Continued.

- restricted; and it may require by statute a preliminary judicial ascertainment of facts, the existence of which is made a condition precedent to the creation of a public corporation. *Barnes v. Minor* 189
8. A city warrant issued for a valid obligation payable out of the general fund is not invalidated by a recital, not contemplated by the statute, that it shall be payable out of a special fund which the city is not authorized to create, or out of a special fund which the city may lawfully create, but has failed to create. *Abrahams v. City of Omaha* 271
9. A city of the class of the city of Lincoln has authority under subd. IV, sec. 9, art. I, ch. 13, Comp. St. 1905, to sell property acquired at a tax sale without obtaining the approval of the electors of the city. *State v. Citizens Street R. Co.* 357
10. A city ordinance extending to a telephone company the right to use the streets and public grounds of the city, and which does not exclude other companies from a like privilege, is not the grant of an exclusive privilege. *City of Plattsmouth v. Nebraska T. Co.* 460
11. Municipal authorities may grant to a telephone company the use of the streets and public grounds for a telephone system, the use being for a public purpose. *City of Plattsmouth v. Nebraska T. Co.* 460
12. Where a city ordinance has invited investments by a telephone company, which are made in good faith and in reliance upon it, the city cannot arbitrarily impose additional burdens on the company which are beyond the reasonable exercise of the police power. *City of Plattsmouth v. Nebraska T. Co.* 460
13. Where no express power is granted a city to license or regulate the business of constructing artificial walks, it cannot be implied from the grant of authority to construct and repair walks as the mayor and council may deem necessary. *Gray v. City of Omaha* 526
14. The provisions of an ordinance to license and regulate the business of constructing artificial walks held unreasonable and void. *Gray v. City of Omaha* 526
15. Where a city made a contract which it was authorized to make, but the statutory procedure was not followed, the contract is merely irregular, and the contractor may recover thereon. *Rogers v. City of Omaha* 591
16. The motive governing a legislative body in passing a statute or ordinance is not a proper subject for investigation by the courts. *McCarter v. City of Lexington* 714

Municipal Corporations—Concluded.

17. The making and repairing of streets by a city relate to its corporate interests only, and it is liable for its failure to perform its duty. *Goodrich v. University Place*..... 774
18. By accepting the special privileges and powers of taxation and local government, cities of the second class and villages assume the liabilities flowing therefrom, and such special privileges and powers are a sufficient consideration for the liabilities thus assumed. *Goodrich v. University Place* 774
19. A city of the second class or village held liable for failure to maintain its streets in a safe condition. *Goodrich v. University Place* 774

New Trial.

Where a question as to the operation of physical laws is involved and a juror seeks the opinion of one specially skilled in such matters, and communicates such opinion to his fellow jurors, it is misconduct, for which the verdict may properly be set aside. *Hoskovec v. Omaha Street R. Co.*.... 784

Officers.

A public office cannot be created, and its powers, duties and emoluments prescribed, by concurrent resolution. *First Nat. Bank v. State* 597

Parties.

1. After dissolution a partner to whom is assigned a right of action of the partnership may be substituted as party plaintiff. *Heenan & Finlen v. Parmele* 514
2. Plaintiff brought replevin in justice court under the name, "Omaha Furniture and Carpet Company," and on appeal was allowed in the district court to substitute his own name. Held, Proper practice under sec. 144 of the code. *Omaha F. & C. Co. v. Meyer* 769

Partition.

1. In partition, where defendant answers claiming title, and participates in a trial to the court, he waives his right to have the title first determined. *Fisher v. Fisher*..... 145
2. In a partition suit, the district court has jurisdiction to construe a will determining the rights of the parties. *Fisher v. Fisher* 145

Partnership.

1. Two assignments of a partnership agreement held not to include a personal promise of one partner to pay a sum of money to the other. Modified on rehearing. *Barnes v. Sim*, 211
2. To authorize suit in a partnership name, a firm must plead that it was formed to carry on trade or business or to hold property in this state. *McJunkin v. Placek & Fittl*.... 373

Pleading.

1. The verification of a pleading is not jurisdictional, and is waived unless objection is made before trial. *Northup v. Bathrick* 36
2. A petition to recover for several breaches of one contract states but one cause of action. *Haurigan v. Chicago & N. W. R. Co.* 132
3. Plaintiff may file an amended petition after the sustaining of a demurrer to his original petition, notwithstanding limitations have run prior to the filing of the amended petition, if the amended petition does not state a new cause of action. *Johnson v. American Smelting & Refining Co.*... 250
4. Amended petition held not to state a new cause of action nor one barred by limitations. *Johnson v. American Smelting & Refining Co.* 250
5. A cause of action alleged in an amended petition held a different cause of action, if dependent on different reasons for holding the defendant liable. *Johnson v. American Smelting & Refining Co.* 256
6. Where the original petition alleged a personal injury because of the negligence of a third party, and that defendant succeeded to the liabilities of such third person, and the amended petition alleged that said injury was caused by defendant's negligence, held that the amended petition stated a new cause of action. *Johnson v. American Smelting & Refining Co.* 256
7. In testing the sufficiency of a pleading, mere conclusions of law will be disregarded. *Johnson v. American Smelting & Refining Co.* 256
8. Cause of action stated. *Johnson v. American Smelting & Refining Co.* 256
9. Where in a suit to quiet title the petition sets forth the adverse title in general terms, the pleading is not for that reason demurrable, but the remedy is a motion to make more definite and certain. *State v. Alter* 405
10. Where suit is brought against a corporation and its officers for specific performance, an amendment to the petition that when the contract was made the corporation was dissolved and some of the defendants were the trustees thereof does not change the cause of action. *Heenan & Finlen v. Parmele*. 514
11. The court should allow an amendment to a pleading after the close of the testimony, if it is in furtherance of justice and conforms to the proof, and the adverse party is not prejudiced. *Blondel v. Bolander* 531
12. On appeal from an inferior court to the district court the

Pleading—Concluded.

- original pleadings may be amended to correct a clerical error. *Kofoid v. Lincoln I. & T. Co.* 634
- 13. Petition *held* not to state facts sufficient to constitute a cause of action for equitable relief. *School District v. De-Long* 667
- 14. In case of misjoinder, plaintiff may dismiss one cause of action and proceed with the other. *McCague Savings Bank v. Croft* 702

Pledges.

- 1. Negotiable instruments may be pledged to secure liabilities arising in the future.. *Brown v. James*..... 475
- 2. A contract of pledge *held* not to secure the payment of moneys afterwards collected for the pledgee by the pledgor as agent and unlawfully converted by the latter. *Brown v. James* 475

Principal and Agent.

- 1. An agent, having authority to sell both real and personal property for a certain sum, cannot, without the consent of his principal, take the personal property on receiving the authorized sum for the real estate. *Northup v. Bathrick*.. 36
- 2. The apparent authority of an agent which will bind his principal is such as the agent appears to have by reason of his actual authority. *Northwest Thresher Co. v. Eddyville State Bank* 377
- 3. Ostensible authority to act as agent may be conferred if the principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to act on such apparent agency. *Northwest Thresher Co. v. Eddyville State Bank* 377
- 4. A general collection agent has power to bind his principal by a contract with a bank, authorizing it to make advancements for freight on machinery sold and to retain the amount advanced from the first moneys collected on notes of his principal placed with the bank for collection. *Northwest Thresher Co. v. Eddyville State Bank*..... 377

Principal and Surety.

- 1. A surety signing a bond to secure deposits of public money affirms the genuineness of previous signatures. *Johnson County v. Chamberlain Banking House* 96
- 2. A surety who signs a bond on condition that it will be signed by other sureties is not released from liability because the others did not sign, unless the obligee has notice thereof. *Johnson County v. Chamberlain Banking House*.. 96

Process.

1. The return of an officer to a writ may be impeached in a collateral proceeding by clear and convincing evidence. *Unangst v. Southwick* 112
2. The return of an officer cannot be impeached except by clear and convincing evidence. *Unangst v. Southwick*.... 119
3. An affidavit for service by publication is not invalid because it has a caption, or because persons named in the affidavit are referred to as defendants. *Becker v. Linton*..... 655
4. The allegation in an affidavit for service by publication that defendants are nonresidents and that service cannot be made on them within the state, *held* not objectionable as alleging a mere conclusion. *Becker v. Linton* 655

Quieting Title.

1. In a suit to quiet title, evidence *held* to sustain decree for defendant. *Miller v. Bradford* 167
2. Where lands of a resident are sold under a decree entered on service by publication, no appearance being made, an action to quiet his title may be brought within ten years from the recording of the deed made on a sale under the decree. *Payne v. Anderson* 216
3. In an action to quiet title as against a sale for taxes under a void decree, an offer to pay such sum as the court may find due on any lien for taxes paid is a sufficient tender. *Payne v. Anderson* 216
4. Evidence in a suit to cancel a deed and quiet title *held* to support decree for plaintiff. *Wetherell v. Adams*..... 584

Quo Warranto.

An information against a corporation by its corporate name admits the existence of the corporation, and if the charge be that the corporation is exercising powers not given by its charter, the action proceeds against the corporation, but, where it is claimed that corporate powers are being usurped by a body which has no corporate existence, the action must be against the individuals. *State v. Lincoln Street R. Co.* 333

Railroads.

1. The mere killing of an animal by a moving train on the tracks of a railway company is not evidence of negligence, nor can negligence be established by inference in contradiction to the testimony of an eyewitness. *Kennedy v. Chicago, B. & Q. R. Co.* 267
2. Evidence *held* insufficient to support verdict for plaintiff. *Kennedy v. Chicago, B. & Q. R. Co.*..... 267
3. A traveler approaching a railroad track laid in a public

Railroads—Concluded.

- street has a right to anticipate that trains will be operated according to law and without negligence. *Schwanenfeldt v. Chicago, B. & Q. R. Co.*..... 790
4. A railroad company operating a train on a city street used by it and pedestrians and vehicles may be required to take precautions which are not necessary when operating trains on its own right of way. *Schwanenfeldt v. Chicago, B. & Q. R. Co.* 790
5. The rule that a traveler must stop, listen and look when approaching a railroad crossing should not be applied to the crossing of a railroad switch laid in a public street. *Schwanenfeldt v. Chicago, B. & Q. R. Co.*..... 790
6. A railroad company using the public streets of a city should give adequate notice of the approach of its trains. *Schwanenfeldt v. Chicago, B. & Q. R. Co.*..... 790

Rape.

1. Record held to contain sufficient evidence corroborating the testimony of the prosecutrix to warrant submission of defendant's guilt to the jury. *Harris v. State*..... 195
2. Where the evidence shows that the prosecutrix was less than 15 years old, held not reversible error to refuse to submit the question of her previous chastity to the jury. *Harris v. State* 195
3. Evidence held to sustain the verdict. *Younger v. State*..... 201
4. Under an information charging rape on a child under 18 years of age and not previously unchaste, a conviction may be had though the act was committed with her consent. *Baxter v. State* 840

Replevin.

- Replevin for possession of grain due from a tenant as rent may be defeated by showing that title and right to possession is in a third person. *Northup v. Bathrick* 36

Sales.

1. Evidence in an action for goods sold held to sustain judgment for plaintiff. *Canadian Fish Co. v. McShane*..... 551
2. Where a purchaser has used a harvesting machine a part of two harvests, he cannot rescind a contract of purchase, though the machine failed to comply with a warranty. *Acme Harvester Co. v. Carroll* 594
3. Evidence in an action on a note given for a harvester held to sustain judgment for plaintiff. *Acme Harvesting Co. v. Carroll* 594
4. Evidence in an action for goods sold held to sustain judgment for plaintiff. *Childs & Co. v. Omaha Paraphernalia House* 673

Schools and School Districts.

1. In designating a school site, the failure to state the township and range in which the section is located held not to render the location uncertain. *McMahon v. School District*. 156
2. Under secs. 11036, 11038, Ann. St., a school district may authorize the removal of the schoolhouse to a new site previous to the acquisition of title thereto. *McMahon v. School District* 156
3. Where the electors of a school district authorize the acquisition of a new school site, and in the description the site is located in section 22, but in a township without the district, and there is but one section 22 within the district, it will be conclusively presumed that the location was on the section 22 within the district. *McMahon v. School District*..... 156

Specific Performance.

1. An oral agreement to convey realty will be specifically enforced where the evidence is clear, and the plaintiff has fully performed. *Harrison v. Harrison* 103
2. Where acts performed tend to show, not only an agreement, but also throw some light on the nature of that agreement, the evidence does not rest wholly in parol. *Harrison v. Harrison* 103
3. A contract for the sale of realty, executed by and between T. E. P. and C. C. P., as vendors, and H., as vendee, will not sustain an action for specific performance by H. & F., a copartnership, against the vendors as trustees of an expired corporation, where the contract discloses that the vendors acted as individuals. *Heenan & Finlen v. Parmele*. 509
4. Where one has obtained a contract by unconscionable means, he will be denied affirmative relief in a suit for specific performance. *Blondel v. Bolander* 531
5. Where one, after making a valid contract, has by fraudulent practices secured a change thereof, and sues for specific performance of the contract as changed, he cannot, after the court has determined the contract as so changed invalid, prosecute his suit for specific performance of the original contract. *Blondel v. Bolander* 531
6. Where, in a suit to enforce a contract obtained by unconscionable practices, defendants ask an accounting for rents, there may be deducted from the rents due the amount expended by plaintiff and the value of his services performed for their benefit. *Blondel v. Bolander*..... 531

Statute of Frauds.

1. Where an oral contract has been fully performed by one of the parties, it is not void under the statute of frauds, though

Statute of Frauds—Concluded.

- a division of profits may be required by its terms for a series of years. *Platte County I. T. Co. v. Leigh I. T. Co.*..... 46
- 2. Where a vendor of chattels by a contract voidable by the statute of frauds makes a subsequent valid sale and delivery of the chattels to a third person, he thereby repudiates the former contract, and the subsequent purchaser may invoke the statute for his own protection. *First Nat. Bank v. Blair State Bank* 400
- 3. Correspondence and an abstract of title held a sufficient memorandum to satisfy the statute of frauds. *Heenan & Finlen v. Parmele* 514
- 4. Where, in an action of forcible detainer, the defendant claims under a parol lease for more than one year, it is proper to direct a verdict for plaintiff. *Kofoid v. Lincoln I. & T. Co.* 634

Statutes.

- 1. While the doctrine of strict construction of statutes in derogation of common right will not be so extended as to hamper public enterprises, property rights of individuals will not be interfered with unless the power is plainly conferred by law. *Campbell v. Youngson* 322
- 2. In considering an amendatory or substituted statute, it is proper to consider the old law with the new one to ascertain the legislative intent, and all provisions of the original statute not carried into the new law are annulled by the repealing statute. *Campbell v. Youngson* 322
- 3. To ascertain the meaning of a statute all existing acts should be considered. *Campbell v. Youngson* 322
- 4. When the legislative journals show that a bill passed by one house has been amended in the other, and that the amendments have not been concurred in by the house in which the measure originated, and have not been receded from with the assent of a majority of all the members of the house by which they were made, the bill is void. *Moore v. Neece* 600
- 5. In construing legislative acts courts will give them the meaning which it is apparent from the language used the legislature had in mind. *State v. Hanson* 738
- 6. An act which provides that it shall take effect on and after its passage and approval does not express an emergency under sec. 24, art. III of the constitution, and it does not take effect until three months after adjournment of the legislative session. *State v. Pacific Express Co.*..... 823

Street Railways.

1. The charter of a street railway company organized to construct lines in a city under the act of February 15, 1877 (laws 1877, p. 135), must fix the termini of the road, and state the streets through which it is proposed to construct the same. *State v. Lincoln Street R. Co.*..... 333
2. The consent of a majority of the electors to the use of the streets by a street railway company must be obtained at an election called for that purpose before construction is commenced. *State v. Lincoln Street R. Co.* 333
3. The consent of the electors to the occupation of all the streets of a city by a street railway company, where no termini are mentioned in the notice of the election, carries no right to the use of any street not used for the road within a reasonable time. *State v. Lincoln Street R. Co.*... 333
4. Where the electors of a city have power to extend to a street car company the right to use the streets of the city, an irregular exercise of such power will not be held void. *State v. Citizens Street R. Co.* 357
5. Where a street railway company, under the belief that it is authorized so to do under a vote of the electors, expends money in the construction of its line, public policy may require courts to protect it in the use of its road so far as constructed, when its right to the use of the streets of the city is brought in question. *State v. Citizens Street R. Co.*, 357
6. The right of a street car company to occupy the streets of a city, granted by a vote of the electors, is a license coupled with an interest, and transferable. *State v. Citizens Street R. Co.* 357

Taxation.

1. In a suit under the scavenger act, the presumption is that the tax was legally levied and assessed, and the burden is on defendant to plead and prove lack of authority of the city authorities to levy the tax. *State v. Several Parcels of Land* 11
2. In assessing the property of a telegraph company having property in more than one state, the value of the whole property, and also its relation to the value of the property in the taxing district should be considered. *Western Union T. Co. v. Dodge County* 18
3. In valuing the property of a telegraph company in a taxing district, the total gross and net receipts of the system as a whole, as well as in the particular district, and also the value of the company's stock and bonds, may be considered. *Western Union T. Co. v. Dodge County* 18

Taxation—Continued.

4. Equalization boards may obtain information of the value of taxable property from the most reliable source at their command, and strict rules of evidence are not applicable. *Western Union T. Co. v. Dodge County* 18
5. The district court on appeal may receive proof of any pertinent fact tending to show the value of taxable property. *Western Union T. Co. v. Dodge County* 18
6. Evidence *held* sufficient to sustain finding of district court in an assessment of property of a telegraph company. *Western Union T. Co. v. Dodge County* 18
7. The net earnings of a telegraph company for a single year, *held* not a proper criterion by which to determine the value of its system for taxation. *Western Union T. Co. v. Dodge County* 23
8. The income from messages in a district comprising only a part of a telegraph system, *held* not the proper measure of the gross earnings of that part of the system within the district. *Western Union T. Co. v. Dodge County* 23
9. That the net earnings of a telegraph company are 13 per cent. of its gross earnings does not justify the conclusion that the net earnings of a district comprising only a part of the system are but 13 per cent. of the gross earnings of such part of the system. *Western Union T. Co. v. Dodge County*. 23
10. On appeal by a taxpayer from the board of equalization, the burden of proof is on appellant. *Western Union T. Co. v. Dodge County* 23
11. The limitation of two years within which a party may redeem from a sale for taxes has no application to a sale made under a void decree foreclosing a tax lien. *Payne v. Anderson* 216
12. Where, in a suit to foreclose a tax sale certificate, a clerical mistake appears to have been made in the description, the error will not defeat the action if sufficient remains to identify the land. *Hart v. Murdock* 274
13. Where land owned by one person is assessed with land of another, so that neither can determine the amount of his tax, the entire tax is void. *Hart v. Murdock* 274
14. In a description of land by metes and bounds, a point of the compass named in a survey may be construed to mean an opposite direction, when it appears to have been written by clerical error. *Hart v. Murdock* 274
15. Purchaser at tax sale *held* entitled to recover purchase

Taxation—Concluded.

- money from the redemptioner, and not from the county.
Hitchcock County v. Cole 375
16. Where a taxpayer makes a tender of his general taxes, and the treasurer refuses to receive the same because he will not also pay an invalid special tax, interest should not be charged the taxpayer. *State v. Several Parcels of Land*... 424
17. Sec. 242 of the revenue act of 1903 (Comp. St., ch. 77, art. I) saves to the parties purchasing land at tax sales held prior to the passage of that act all rights under the statute in force when the purchase was made. *Whiffin v. Higginbotham* 468
18. After confirmation of a sale for delinquent taxes under the scavenger act, the deed to the purchaser will not be set aside for irregularity in the levy, or because a void special tax was included in the sale. *Ambler v. Patterson* 570
19. A separate notice to redeem from a tax sale should, when published, be given to each owner of lands sold. *Ambler v. Patterson* 570
20. A notice running to several different persons, and describing different tracts in which each had a separate interest, held not sufficient. *Ambler v. Patterson* 570
21. A tax deed issued to a former tenant cannot be avoided on the ground that the former tenant was indebted to the fee owner for rent which accrued during the tenancy. *Manning v. Oakes* 471
22. Where a decree foreclosing a tax lien was entered against a resident on service by publication, in an action to redeem from a sale under said decree, held error to require plaintiff to pay the costs of the foreclosure suit and sale. *Wagner v. Lincoln County* 473

Telegraphs.

- For breach of contract to transmit a message a telegraph company is liable for such damages as may reasonably be supposed to have been within the contemplation of the parties.
Smith v. Western Union T. Co. 395

Tender. See QUIETING TITLE, 3.**Trial.** See APPEAL AND ERROR. CRIMINAL LAW.

1. Fraud or imposition on the court and against defendant, practiced by plaintiff during the trial, does not justify dismissal of his action without a determination of its merits.
Fitch v. Martin 60
2. The courts are not bound by the rules of evidence adopted in another jurisdiction. *Malcom Savings Bank v. Cronin*.. 228

Trial—Concluded.

3. Under sec. 284 of the code, the trial court may in his discretion require the jury to view property within this state which is the subject of litigation. *Beck v. Staats*..... 482
4. An objection that a question is leading, incompetent, immaterial and irrelevant is not equivalent to an objection that the party is seeking thereby to impeach his own witness. *Cady Lumber Co. v. Wilson Steam Boiler Co.*..... 607
5. Where the facts are undisputed, but different minds might honestly draw different conclusions as to whether such facts established negligence, the question is for the jury. *Schwandenfeldt v. Chicago, B. & Q. R. Co.*..... 790
6. Instructions as to preponderance of evidence and number of witnesses, held erroneous. *Hoskovec v. Omaha Street R. Co.* 784

Usury.

1. A contract to pay compound interest is not usurious, and will be enforced in the amount of simple interest computed at the maximum rate. *Sanford v. Lundquist* 408
2. Where the original obligation bears interest at the maximum rate, there is no consideration for an agreement to pay interest on interest for a time past; but including such interest in a renewal note does not make it usurious. *Sanford v. Lundquist* 408
3. The demanding of interest in advance, though the highest rate is charged, is not usury under Comp. St. 1907, ch. 44, sec. 1. *Sanford v. Lundquist* 414
4. Where the maximum rate of interest is charged, interest on interest cannot be stipulated for at the time of the loan. *Sanford v. Lundquist* 414
5. An agreement that past-due interest shall carry interest is valid, though the principal bears the maximum rate, and such subsequent agreement also stipulates for the maximum rate. *Sanford v. Lundquist* 414

Vendor and Purchaser.

1. It is not necessary for a purchaser of real estate to personally inspect the public records, but he may do this by his agent. *Stewart v. Walker* 68
2. Evidence held insufficient to show that plaintiff's contract to convey land in settlement of her husband's indebtedness was secured by duress. *Unangst v. Southwick* 112
3. The measure of damages for breach by vendor of an executory contract to convey real estate is the difference between the value of the land at the time of the breach and the

Vendor and Purchaser—Concluded.

contract price, and the vendee may also recover the amount advanced on the purchase price. *Beck v. Staats* 482

4. On an issue between a vendor and vendee, where the contract fails to specify improvements made by a tenant in possession, but recognizes the right of the tenant to remove them, the presumption is that such improvements were removed at the expiration of the lease. *Beck v. Staats*..... 482
5. A contract for the sale of realty that does not describe the land so as to render it possible to ascertain the exact description is void for uncertainty. *Heenan & Finlen v. Parmele* 509

Waters.

1. The proviso in sec. 1, art. III, ch. 93a, Comp. St. 1905, that, where ditches have been previously constructed of sufficient capacity to water the land thereunder, such ditches and land shall be exempt from the operation of the law, is for the benefit of the owners of the land, as well as for the owners of the ditches. *State v. Several Parcels of Land*..... 424
2. In the organization of an irrigation district, the judgment of the county board as to matters committed to it cannot be collaterally attacked; but whether land is under a ditch already constructed of sufficient capacity to water the same is not left by the statute to the county board, but is exempted under sec. 1, art. III, ch. 93a, Comp. St. 1907. *State v. Several Parcels of Land* 424
3. Secs. 46-53, art. III, ch. 93a, Comp. St. 1907, are not applicable where land is under a ditch already constructed of sufficient capacity, such land being expressly exempted by sec. 1 of said art. III. *State v. Several Parcels of Land*..... 424

Wills.

1. A devise on condition that the devisee support testator during his lifetime, *held* a devise on a condition precedent, requiring substantial performance to vest title in the devisee. *Fisher v. Fisher* 145
2. A will should be construed, if possible, so as to give effect to every part thereof. *Fisher v. Fisher* 145
3. Unless a different intention is apparent, words of limitation in a devise will be given their usual meaning. *Fisher v. Fisher* 145
4. Waiver of a condition precedent to the vesting of a devise can generally be shown only from the will or a codicil. *Fisher v. Fisher* 145
5. Nonperformance of a condition precedent to the vesting of

Wills—Concluded.

- a devise is not excused by devisee's ignorance of the condition. *Fisher v. Fisher* 145
6. Evidence held insufficient to show substantial performance of the conditions of a devise. *Fisher v. Fisher* 145

Witnesses.

1. Under sec. 329 of the code, an interested party may testify only to such conversations and transactions had with decedent as were testified to by a witness for the representative. *In re Estate of Neckel* 123
2. That a witness was intoxicated at the time of the happening of events about which he testifies is relevant, and may be shown without first asking whether he was intoxicated. *Bliss v. Beck* 290
3. It is within the discretion of the trial court to allow counsel to ask a witness called by him, who takes him by surprise by his testimony, whether he had not at a prior time made a statement inconsistent therewith. *Cady Lumber Co. v. Wilson Steam Boiler Co.* 607

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